Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ROBYN A. TODD,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition for a Writ of Certiorari To The Alaska Supreme Court

PETITION FOR WRIT OF CERTIORARI

JOHN B. SALEMI
Public Defender
State of Alaska

G. BLAIR McCUNE
Assistant Public Defender
Counsel of Record for Petitioner

Public Defender Agency
900 W. 5th Avenue, Ste. 200
Anchorage, Alaska 99501
(907) 264-4400

132 pp

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars multiple punishment for felony murder and an underlying felony absent specific statutory authorization or a clear expression of legislative intent?

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Robyn A. Todd respectfully petitions for a Writ of Certiorari to review the judgment of the Alaska Supreme Court in this case.

LIST OF PARTIES

Petitioner Robyn A. Todd and Joseph Harvey were the only petitioners in the Alaska Supreme Court. (App. 1) Petitioner was the only appellant in the Alaska Court of Appeals. (App. 29) Petitioner and Joseph Harvey were the only defendants in the Superior Court for the State of Alaska, Third Judicial District. (App. 94) The State of Alaska was plaintiff in the Superior Court, appellee in the Alaska Court of Appeals, and respondent in the Alaska Supreme Court.

OPINIONS BELOW

The opinion of the Alaska Supreme Court is reported at 917 P.2d 674 (Alaska 1996). (App. 1-28) The opinion of the Alaska Court of Appeals is reported at 884 P.2d 668 (Alaska Ct. App. 1994). (App. 29-89) The oral decision of the Superior Court for the State of Alaska, Third Judicial District is unreported and is attached. (App. 94-99)

JURISDICTION

The Alaska Supreme Court filed its initial decision on April 26, 1996. On June 21, 1996, that court denied Todd's timely petition for rehearing, and issued its final, corrected decision. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional and statutory provisions: Amendments V and XIV to the United States Constitution, set out at App. 90; Alaska Statutes, Section 11.41.110(a)(3)(1989)(Murder in the Second Degree) set out at App. 91-92; and Alaska Statutes, Section 11.41.500(a)(1) (1989) (Robbery in the First Degree), set out at App. 92-93.

STATEMENT OF THE CASE

Petitioner Robyn A. Todd ("Todd") and Joseph Harvey ("Harvey") robbed the Hub Bar in downtown Anchorage, Alaska on November 4, 1991. Both Todd and Harvey were armed. The robbery took place early in the

morning when the night's receipts were being counted. The only people present in the bar were the owner, Lloyd Dahl, a bookkeeper, and a janitor.

After gaining entrance to the bar, Todd took the janitor into the kitchen area, while Harvey went to the front of the bar where the office was located. Harvey went into the office and began putting money in a bag. The bookkeeper ran outside the bar. While Todd was still in the kitchen with the janitor, Harvey shot and killed Dahl in a struggle. Harvey and Todd then fled the bar. They were caught by the police across the street. (App. 3-4)

Todd and Harvey were charged as co-defendants in the Superior Court for the State of Alaska, Third Judicial District ("superior court"), in a single indictment. At trial, the jury found both Todd and Harvey guilty of felony murder, which, in Alaska, is Murder in the Second Degree. ALASKA STAT. § 11.41.110(a)(3) (1989) Todd and Harvey were also convicted of Robbery in the First Degree. ALASKA STAT. § 11.41.500 (a)(1)(1989). Robbery was the underlying felony in the second degree murder conviction.[1]

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[1]Todd and Harvey were also convicted of third degree assault and weapons misconduct charges. But no question

(App. 4)

Prior to sentencing, Todd argued that imposing separate convictions and consecutive sentences on felony murder and robbery would violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The superior court rejected this argument in an oral decision at the sentencing proceedings. (App. 94-99)

The superior court sentenced Todd to twenty years imprisonment on the felony murder conviction, consecutive to a sentence of twelve years on the underlying robbery. (App. 4-5)

Todd appealed this sentence to the Alaska Court of Appeals, again arguing that separate convictions and consecutive sentences violated the Fifth Amendment's Double Jeopardy Clause. The Alaska Court of Appeals affirmed the superior court in a written, published opinion which is set out in the appendix. (App. 29-89)

Todd then filed a petition for hearing in the Alaska Supreme Court requesting discretionary review. The Alaska Supreme Court granted the petition for hearing. (App. 100-

01) However, that court ultimately affirmed the multiple punishment imposed by the superior court in a written, published opinion set out in the appendix. (App. 1-28) Todd filed a timely petition for rehearing. The Alaska Supreme Court denied the petition for rehearing, but issued an opinion correcting a factual error on June 21, 1996. (App. 2) This petition followed.

REASONS FOR GRANTING THE WRIT

Introduction

The Alaska Supreme Court's decision in *Todd v. State*, 917 P.2d 674 (Alaska 1996)(App. 1-28) conflicts with this Court's decisions on multiple punishment double jeopardy, including *Rutledge v. United States*, 116 S.Ct. 1241 (1996), *Ball v. United States*, 470 U.S. 856 (1985); *Missouri v. Hunter*, 459 U.S. 359 (1983), and *Whalen v. United States*, 445 U.S. 684 (1980). In each of these cases, this Court applied the *Blockburger*[2] statutory construction test to determine whether the offenses were the "same offense" for double jeopardy purposes. *Rutledge*, 116 S.Ct. at 1245-47;

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[2]*Blockburger v. United States*, 284 U.S. 299 (1932).

Ball, 470 U.S. at 862; *Hunter*, 459 U.S. at 367-68; *Whalen*, 445 U.S. at 692-95. If the offenses were the "same," this Court held that multiple punishment could not be imposed unless the legislature specifically authorized it or, at the very least, clearly expressed an intent to allow multiple punishment. *Rutledge* at 1249 n.14; *Ball* at *862; Hunter* at 368-70; *Whalen* at 693-96.

In *Todd*, the Alaska Supreme Court did not apply the *Blockburger* test, ruling that the test did not have to be applied if the legislature's intent to permit multiple punishment was "clear." *Todd*, 917 P.2d at 679 n.4 (App. 13) Despite its recognition of this principle, ultimately, all that the Alaska court found was that the legislature "intended" to allow multiple punishment. *Todd* at 681 (App. 21)

Although this Court will defer to the Alaska Supreme Court on interpretation of Alaska law [*Missouri v. Hunter*, 459 U.S. at 369], the right test must be applied. The Alaska court simply did not find the required specific authorization for multiple punishment or at least a clear expression or statement of legislative intent. *Compare Todd* at 681 (App. 21) *with Rutledge* at 1249 n.14.

This is not merely a question of semantics. The Double Jeopardy Clause requires courts to assume that the legislature does not intend to impose multiple punishment for the same offense. *Rutledge* at 1245; *Ball* at 862. Multiple punishment for the same offense without clear legislative authorization violates Double Jeopardy and constitutes an incursion on the legislature's authority to prescribe punishments for crimes. *Rutledge* at 1245; *Whalen* at 691-92. Because of the absence of the required clear legislative authorization, the Alaska Supreme Court's opinion in *Todd* conflicts with the decisions of this Court and a writ of certiorari should be granted under Supreme Court Rule 10(b).

The Alaska Supreme Court's decision in *Todd* also conflicts with decisions of the courts of last resort of a number of other states. *See* Section II, *infra*. Many state courts have addressed this issue, and there is vigorous disagreement on whether double jeopardy prevents multiple punishment for both felony murder and a predicate felony. *Id.* A writ of certiorari should also be granted under Supreme Court Rule 10(c).

I. THE ALASKA COURT'S DECISION IN *TODD* CONFLICTS WITH THIS COURT'S DECISIONS ON MULTIPLE PUNISHMENT DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment provides for three different types of protection: protection against successive prosecution for the same offense after acquittal, protection against successive prosecution after conviction, and protection against multiple punishment for the same offense. *Missouri v. Hunter*, 459 U.S. at 366-67; *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *modified on other grounds*, *Alabama v. Smith*, 490 U.S. 794 (1989).[3] The present case concerns the last of these three protections.

There are two clear, generally-accepted principles in multiple punishment double jeopardy law. The first principle is that double jeopardy is not a bar unless the offenses are the "same offense" for double jeopardy purposes. *Missouri v. Hunter*, 459 U.S. at 367; *Albernaz v. United States*, 450 U.S. 333, 339 (1981). The second principle is that prescribing the

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[3]The Fifth Amendment's protection against double jeopardy is enforceable against the states through the Fourteenth Amendment and applies to state court prosecutions such as the one in the present case. *Benton v. Maryland*, 395 U S. 784 (1969).

punishment for crimes is a matter for the legislature, not the courts, to decide. *Hunter* at 367; *Whalen v. United States*, 445 U.S. at 690.

In the present case, the offenses involved are felony murder, which is Murder in the Second Degree in Alaska, and Robbery in the First Degree. ALASKA STAT. § 11.41.110(a)(3); ALASKA STAT. § 11.41.500(a)(1)(App. 91-93) The robbery conviction was the underlying or predicate felony in the felony murder conviction. (App. 3-4) Multiple punishment was imposed. Petitioner was sentenced to a twenty year period of incarceration for felony murder and to a consecutive twelve year sentence for armed robbery. (App. 4-5)

This Court has held that felony murder and an underlying felony are the "same offense" under the *Blockburger* test. *Whalen v. United States*, 445 U.S. at 694-95; *Harris v. Oklahoma*, 433 U.S. 682 (1977). The reasoning behind these decisions is undeniably sound. The *Blockburger* test asks whether "each" offense requires proof of a fact that the other does not. *Blockburger*, 284 U.S. at 304. In the case of greater and lesser included offenses, the *Blockburger* test is met because the greater offense will, by

definition, always require proof of all the elements of the lesser, plus an additional element or elements. *See Rutledge v. United States*, 116 S.Ct. at 1245; *Brown v. Ohio*, 432 U.S. 161, 169 (1977). In the present case, although felony murder requires proof of facts that robbery does not, robbery does not require proof of any additional element not already necessarily included in felony murder. Therefore, the offenses are the same for double jeopardy purposes. *See Whalen*, 433 U.S. at 695; *Harris*, 433 U.S. at 683-84.[4]

The next principle, involving the legislature's authority to set punishment for crimes, is more problematical and forms the nub of the controversy in the present case. The lead opinion in *United States v. Dixon*, 509 U.S. 688 (1993), contains the following statement:

> In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" [or

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[4]Although the Alaska Court acknowledged this authority, it did not apply the *Blockburger* test and eventually concluded that robbery was not a lesser included offense of felony murder. *Todd* at 682.

> *Blockburger*] test, the double jeopardy bar applies. [Citations omitted] The [*Blockburger* test] inquires whether each offense contains an element not contained in the other; if not, they are the "same offense" and double jeopardy bars additional punishment and successive prosecution.

Id. at 696. If this statement is literally applied, the Court in *Dixon* set up a unitary test for both successive prosecution and multiple punishment double jeopardy: as long as offenses are the same under the *Blockburger* test, both successive prosecution and multiple punishment would be barred.[5] Obviously, if a unitary test is applied in the present case, multiple punishment for felony murder and robbery would violate double jeopardy.

Although Petitioner would like nothing better than for this Court to adopt a unitary test, he must acknowledge that

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[5]Petitioner raised this issue in the Alaska Supreme Court. That court firmly rejected the idea that there was a "unitary test," agreeing with Respondent's argument that Petitioner had taken Justice Scalia's words in the lead opinion "out of context." *Todd*, 917 P.2d at 678 n.3 (App. 9-11)

this Court most probably would not have intended to overrule the important case of *Missouri v. Hunter, sub silento*.

In *Missouri v. Hunter*, this Court examined a Missouri statute prohibiting "armed criminal action." *See Hunter*, 459 U.S. at 363. This statute required the sentencing court to impose a consecutive three year term of imprisonment when a dangerous or deadly weapon was used in the commission of any felony offense. *Id.* The Missouri courts concluded that multiple punishment for armed criminal action and the underlying felony offense was barred by double jeopardy because the offenses were the same under *Blockburger*. *See Hunter*, 459 U.S. at 363-66. However, this Court found it to be critical that in the statute itself, the Missouri legislature required imposition of a consecutive three year sentence. *Hunter* at 363-65. Noting that the legislature had the ultimate power to decide what sentences could be imposed, this Court held as follows:

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and [cumulative

punishment may be imposed].

Missouri v. Hunter, 459 U.S. at 369.

The unitary test in *Dixon* can easily be reconciled with *Missouri v. Hunter* by adding a proviso: if the legislature provides specific statutory authorization for multiple punishment, double jeopardy will not bar multiple punishment even if the offenses are the same under *Blockburger*. This is a clear, easily-applied rule of law that is supported by *Hunter* and other multiple punishment double jeopardy cases. *Rutledge*, 116 S.Ct. at 1249 n.14; *Ball*, 470 U.S. at *862*; *Whalen*, 445 U.S. at 694-96. Petitioner's robbery conviction would be barred under such a rule because the Alaska legislature did not provide specific statutory authorization for multiple punishment. *See Todd*, 917 P.2d at 679-81 (App. 13-21) (relying on legislative history and other statutory construction rules, not specific authorization).

Another possible approach would be to require a "clear expression" of legislative intent as suggested in other language in this Court's multiple punishment double jeopardy opinions. *See e.g. Rutledge*, 116 S.Ct. at 1249 n.14 ("clear statement" necessary); *Missouri v. Hunter*, 459 U.S. at 369

("clearly expressed legislative intent"); *Whalen*, 445 U.S. at 693 ("clear indication of contrary legislative intent"). Unfortunately, this approach raises the difficult question of how "clear" the contrary legislative intent must be.

The confusion resulting from merely requiring "clear" legislative intent is evident in the Alaska courts' decisions in the present case. *See Todd*, 917 P.2d at 679-681 (App. 13, 21) As noted above, although the Alaska Supreme Court appeared to acknowledge that it was required to find "clear" legislative intent for multiple punishment, ultimately, it only found that the Alaska legislature "intended" to permit multiple punishment. *Todd*, 917 P.2d at 681 (App. 21). The Alaska Supreme Court merely relied on legislative history and other statutory construction rules, not on a clear expression or statement on the part of the Alaska legislature that multiple punishment was permitted for felony murder and an underlying felony. *Id.* at 679-81. The Alaska Court of Appeals opinion reveals an even greater misunderstanding of basic constitutional principles. In *Todd v. State*, 884 P.2d 668 (Alaska Ct. App. 1994), that court acknowledged the requirement of *Missouri v. Hunter* for specific authorization, but actually rejected this Court's holding. Instead, the Alaska Court of Appeals decided it could apply "normal methods of

statutory interpretation" that revealed "a legislative intention to allow cumulative punishment", instead of the required specific authorization or clear expression of legislative intent. *Todd v. State*, 884 P.2d at 675 n.6 (App. 50)

Petitioner is raising more than a semantic argument. In *Whalen*, this Court found that multiple punishment for the same offense violates not only the constitutional protections afforded by the Double Jeopardy Clause, but also "the constitutional principle of separation of powers ..." *Id.* at 692. This Court was concerned not only with the severe consequences of violations of Double Jeopardy rights, which almost always involve imprisonment and loss of liberty, but also was concerned that courts only impose statutorily authorized punishment. In *Ball v. United States*, this Court held that "[t]he assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same offense under two different statutes." *Ball* at 862; *see also Rutledge*, 116 S.Ct. at 1245.

Although the Alaska court applied "normal" rules of statutory construction in determining legislative intent, more was required. If this Court decides not to adopt the unitary test set out in *United States v. Dixon*, *supra*, this Court

should conclude that a legislature must provide specific statutory authorization for multiple punishment as the Missouri legislature did in *Missouri v. Hunter*. At the very least, a "clear expression" of legislative intent must be found. This clear expression should not merely embody a court's assumptions about what a legislature intended, but should be grounded in language in the statute itself or in legislative history that specifically addresses the issue of multiple punishment for the offenses involved and clearly expresses the legislature's intent to allow multiple punishment.

II. THE ALASKA COURT'S DECISION IN *TODD* CONFLICTS WITH DECISIONS OF COURTS OF LAST RESORT OF OTHER STATES

There is a split of authority among state courts as to whether the Double Jeopardy Clause of the Fifth Amendment bars punishment for both felony murder and an underlying felony. The more well-reasoned cases base their decisions on *Missouri v. Hunter*, *Whalen v. United States*, and other of this Court's cases that require specific authorization or a clear indication of legislative intent to permit multiple punishment. *Hunter*, 459 U.S. at 369; *Whalen*, 445 U.S. at 693.

In a recent case, *State v. McHenry*, 550 N.W.2d 364 (Neb. 1996), the Nebraska Supreme Court held that imposing multiple punishment for felony murder and an underlying felony was plain error. The Nebraska court first noted that whether multiple punishment can be imposed depends upon legislative intent. *Id.*, 550 N.W.2d at 378. The court went on to find that if a "statute clearly and affirmatively indicates" that the legislature intended cumulative punishment, double jeopardy is not offended. *Id.* However, because there was "no affirmative indication" of legislative intent, the Nebraska court concluded that multiple punishment violated the Double Jeopardy Clause. *Id.* Thus, the Nebraska court correctly found that there had to be an affirmative indication in the statutes themselves before multiple punishment could be imposed.

In another case, *Cook v. State*, 841 P.2d 1345 (Wyo. 1992), the Wyoming Supreme Court held that multiple punishment for felony murder and an underlying felony (aggravated robbery) offended the Double Jeopardy Clause. The Wyoming court overruled an earlier case, *Birr v. State*, 744 P.2d 1117 (Wyo. 1987), which held that an underlying felony was not a lesser included offense of felony murder. *Cook v. State*, 841 P.2d at 1350-53; *see also Birr v.*

Shillinger, 894 F.2d 1160 (10th Cir.), *cert. denied*, 496 U.S. 940 (1990). The Wyoming court found that the *Blockburger* test controlled unless there was specific authorization for multiple punishment or a "clear indication" of legislative intent. *Cook* at 1348, 1352.

In finding that there was no clear indication of legislative intent, the Wyoming court in *Cook v. State* undertook a careful analysis of its robbery and felony murder statutes. The court first found that the felony murder statute's purpose was to "discourage *negligent or accidental* killings" in the course of dangerous felonies and that the felony murder statute imposed "a form of strict responsibility on those perpetrating the underlying felonies ...." *Cook* at 1351 (emphasis in original, citations omitted). The court went on to find that purpose of the robbery statute was to protect against the threat or use of violence against the person and that the purpose of felony murder statutes was similar. *Id.* at 1352. The Wyoming court rejected its earlier holding, in *Birr v. State*, *supra*, that the robbery statute was intended to protect an interest in property. *Cook* at 1352.

The Wyoming Supreme Court's analysis is contrary to the Alaska Supreme Court's in *Todd*. The Alaska court

found that "distinct" interests were protected by felony murder and robbery statutes. *Todd*, 917 P.2d at 680. The Wyoming court's analysis makes much more sense. The Alaska felony murder statute, like the Wyoming statute, is a "strict responsibility" offense. *See Cook* at 1351; ALASKA STAT. § 11.41.110(a)(3)(App. 91-92). The strict liability nature of the offense is evident in Petitioner's case. Petitioner did not cause the bar owner's death. (App. 3-4) His criminal liability for that death was based solely on his participation in the robbery. *Id.* Essentially, the jury only had to find that he participated in the robbery and that another person (not one of the participants) was killed. (App. 91-92) In a felony murder prosecution, where criminal liability is so dependent on the commission of the underlying felony, it makes little sense to suppose that the legislature intended to permit multiple punishment on the theory that felony murder and the underlying felony are directed at "separate evils." *Cf. Albernaz v. United States*, 450 U.S. 333, 343 (1981).

In another case, *Boulies v. People*, 770 P.2d 1274 (Colo. 1989), the Colorado Supreme Court found that the Double Jeopardy Clause prohibited multiple punishment unless the legislature "specially authorized" it. The Colorado

court held that the authorization should have its source in "the statutory text itself" rather than on the basis of presumptions about what the legislature intended. *Id.* at 1281. Because of the absence of specific authorization, the Colorado court held that multiple punishment was barred by the Double Jeopardy Clause. *Id.*

Finally, in *Shabazz v. Commonwealth*, 439 N.E.2d 760 (1982), the Supreme Judicial Court of Massachusetts found that multiple punishment for felony murder and an underlying robbery offense "was inconsistent with the common law rule in this Commonwealth and with the double jeopardy clause of the Fifth Amendment ..." *Id.* at 762. The Massachusetts court noted the "dicta" in this Court's decision in *Albernaz v. United States*, *supra*, but found no "clear indication" of legislative intent to impose multiple punishment. *Shabazz* at 762. The Massachusetts decision is significant because the "common law rule" it referred to eventually became this Court's test in *Blockburger*. *See Blockburger*, 284 U.S. 299, 304 (1932) and *In re Nielsen*, 131 U.S. 176, 188 (1889); (quoting *Morey v. Commonwealth*, 108 Mass. 433, 435 (1871)).

McHenry, *Cook*, *Boulies*, and *Shabazz* are but four examples of many other state court decisions that hold that multiple punishment cannot be imposed for felony murder and an underlying felony. *See Swaite v. State*, 612 S.W.2d 307 (Ark. 1981); *Walker v. State*, 327 S.E.2d 475 (Ga. 1985), *cert. denied*, 474 U.S. 865 (1985); *State v. Pizzuto*, 810 P.2d 680 (Idaho 1991), *cert. denied*, 503 U.S. 908 (1992); *Candler v. State*, 363 N.E.2d 1233 (Ind. 1977); *State v. Smith*, 600 So.2d 919 (La.Ct.App. 1992), *writ denied*, 625 So.2d 1031 (La. 1993), *see also Neville v. Butler*, 867 F.2d 886 (5th Cir. 1989)(applying Louisiana law); *People v. Wilder*, 308 N.W.2d 112 (Mich. 1981); *State v. Fratzke*, 354 N.W.2d 402 (Minn. 1984); *State v. Lane*, 629 S.W.2d 343 (Mo. 1982)(en banc), *see also Jones v. Thomas*, 491 U.S. 376 (1989); *State v. Quesinberry*, 354 S.E.2d 446 (N.C. 1987), *vacated on other grounds*, 494 U.S. 1022 (1990); *Munson v. State*, 758 P.2d 324 (Okla. 1988), *cert. denied*, 488 U.S. 1019 (1989); *State v. Fish*, 577 P.2d 500 (Ore. 1978); *Commonwealth v. Tarver*, 426 A.2d 569 (Pa. 1981), *but see Gillespie v. Ryan*, 837 F.2d 628 (3rd Cir. 1988); *State v. Julius*, 408 S.E.2d 1 (W.Va. 1991).

There are a number of state court decisions that hold that double jeopardy does not bar multiple punishment for

felony murder and an underlying felony. In many of these cases, the state courts held, as the Alaska Supreme Court in *Todd* ultimately did [*Id.*, 917 P.2d at 682], that an underlying felony was not a lesser included offense of felony murder. *See State v. Enmund*, 476 So.2d 165 (Fla. 1985), *rev'd on other grounds, Enmund v. Florida*, 458 U.S. 782 (1982); *State v. Gonzales*, 783 P.2d 1239 (Kan. 1989); *State v. Close*, 623 P.2d 940 (Mont. 1981); *Talancon v. State*, 721 P.2d 764 (Nev. 1986); *State v. Martinez*, 622 P.2d 1041 (N.M. 1981); *State v. McCovey*, 803 P.2d 1234 (Utah 1990). Although this theory was not the sole reason for these decisions, it played an important role in most of them. This theory is contrary to this Court's decisions in *Whalen v. United States* and *Harris v. Oklahoma*, *supra*, and should be rejected.

In other cases, state courts followed *Whalen* and *Harris*, but found that their legislatures did intended to allow multiple punishment. *See State v. Greco*, 579 A.2d 84 (Conn. 1990); *Whalen v. State*, 434 A.2d 1346 (Del. 1981); *Rhode v. Olk-Long*, 84 F.3d 284 (8th Cir. 1996)(applying Iowa law); *State v. Blackburn*, 694 S.W.2d 934 (Tenn. 1985); *Fitzgerald v. Commonwealth*, 292 S.E.2d 798 (Va. 1982), *cert. denied*, 459 U.S. 1228 (1983). In most of these decisions, the courts based their findings, at least in part, on the theory that felony

murder and the underlying felony are directed at "separate evils." *See e.g. Greco*, 579 A.2d at 90-91; *Blackburn*, 694 S.W.2d at 937. This analysis should be rejected. It does not take into account the critical role of an underlying felony in felony murder. *See* discussion of *Cook v. State*, *supra*.

This court should grant certiorari to resolve this dispute among state courts of last resort. SUP. CT. R. 10(c) This dispute is of long standing, and courts on each side of the question firmly adhere to their positions.

CONCLUSION

This Court should grant a writ of certiorari to the Alaska Supreme Court.

Respectfully submitted,

G. BLAIR McCUNE
Assistant Public Defender
State of Alaska

September 17, 1996

App. 1

Robyn TODD, Petitioner,

v.

STATE of Alaska, Respondent.

Joseph HARVEY, Petitioner,

v.

STATE of Alaska, Respondent.

No. S-6709, S-6807

Supreme Court of Alaska.

April 26, 1996

Rehearing Denied June 21, 1996

G. Blair McCune, Assistant Public Defender, and John B. Salemi, Public Defender, Anchorage, for Petitioner Todd.

Mitchel J. Schapira, Anchorage, for Petitioner Harvey.

Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Respondent.

Before COMPTON, C.J., and RABINOWITZ, MATTHEWS and EASTAUGH, JJ.

ORDER

IT IS ORDERED:

1. The petition for rehearing is DENIED.

2. However, factual misstatements in the last paragraph of page 2, which are irrelevant to the substantive decision have been corrected.

3. Accordingly, Opinion No. 4341 issued on April 26, 1996, is WITHDRAWN.

4. Opinion No. 4357 is issued on this date in its place.

Entered by direction of the court at Anchorage, Alaska on June 21, 1996.

Before COMPTON, C.J., RABINOWITZ, and MATTHEWS

OPINION

COMPTON, Chief Justice.

I. INTRODUCTION

Robyn Todd and Joseph Harvey seek review of the

court of appeals' opinion affirming their convictions and corresponding sentences for both second-degree (felony) murder and first-degree robbery in connection with an armed robbery during which a man was killed. They assert that the Double Jeopardy Clauses of the United States and Alaska Constitutions bar conviction and punishment for both felony murder and the predicate felony. We affirm.

II. FACTS AND PROCEEDINGS

The underlying facts are not in dispute. Armed and wearing ski masks, Todd and Harvey entered a bar in downtown Anchorage early one morning while the bar's owner, Lloyd Dahl, and his employees, George Gillis and Nancy Lee Jourdan, were cleaning up and counting the evening's receipts.

While Todd guarded Gillis in the kitchen area at the back of the bar, Harvey went into the bar office where Dahl was counting the money. Dahl tried to prevent Harvey from taking the money and was shot and killed. Jourdan heard the gunshot from outside the office. She fled the bar and flagged down a passing community patrol van. The police were

alerted. They confronted Todd and Harvey as the pair left the bar and apprehended them a short time later.

At a joint trial, Todd and Harvey were convicted of the first-degree robbery of Dahl, the second-degree (felony) murder of Dahl, the third-degree assault of Gillis, and Misconduct Involving Weapons in the First Degree. Todd also was convicted of the third-degree assault on police officer Pam Nelson.

At sentencing, Harvey and Todd argued that the Double Jeopardy Clauses of the United States[1] and Alaska Constitutions[2] barred separate convictions for second-degree (felony) murder and the predicate offense of first-degree robbery. The court disagreed. Todd was sentenced to twenty years imprisonment for the second-degree murder charge,

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[1] The Fifth Amendment to the United States Constitution provides in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Through the Fourteenth Amendment, state prosecutions also are subject to the strictures of Fifth Amendment double jeopardy. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969).

[2] Alaska Const. art. I, § 9 provides: "No person shall be put in jeopardy twice for the same offense."

consecutive to twelve years imprisonment for the first-degree robbery charge. Harvey was sentenced to thirty years for the murder, consecutive to twelve years for the robbery.

On appeal, the court of appeals determined that the underlying felony "may be" a lesser-included offense of felony murder under Alaska law, *Todd v. State*, 884 P.2d 668, 686 (Alaska App.1994), but held that Todd's and Harvey's convictions and consecutive sentences for felony murder and the predicate robbery were fully consistent with federal double jeopardy law and the Alaska Constitution as interpreted in *Whitton v. State*, 479 P.2d 302 (Alaska 1970). Todd, 884 P.2d at 682, 685-86. The court of appeals observed that its holding at least facially conflicted with *Tuckfield v. State*, 621 P.2d 1350 (Alaska 1981), in which this court observed that "double jeopardy is violated by conviction of both an offense and a lesser included offense, unless the convictions arise from separate conduct," and its own holding in *Hughes v. State*, 668 P.2d 842 (Alaska App.1983). *Todd*, 884 P.2d at 680-82. However, the court interpreted more recent Supreme Court decisions to supersede *Tuckfield*'s analysis and therefore declined to follow *Tuckfield* and overruled *Hughes*. *Todd*, 884 P.2d at 682, 686.

Todd and Harvey separately petitioned this court for review of the court of appeals' decision. Appellate Rule 302(a). We granted the petitions and consolidated the cases for review.

III. DISCUSSION

A. Standard of Review

The issue before the court involves questions of constitutional law and statutory interpretation which we resolve by applying our independent judgment. *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992); *Norton v. Alcoholic Beverage Control Board*, 695 P.2d 1090, 1092 (Alaska 1985). Our duty is to adopt the rule of law which is most persuasive in light of precedent, reason and policy. *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

B. Federal Double Jeopardy Law

The Double Jeopardy Clause of the Fifth Amendment protects against multiple prosecutions and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). As Todd and Harvey were convicted of all charges in

a single proceeding, the only issue is whether their consecutive sentences impermissibly subject them to multiple punishments for the same offense. See *Missouri v. Hunter*, 459 U.S. 359, 365-66, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983).

In *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), the Supreme Court laid out the test to determine whether the violation of two statutory provisions constitutes two offenses or only one. It is "whether each provision requires proof of an additional fact which the other does not." Id. The Supreme Court consistently has applied the *Blockburger* test for this limited purpose. See *Whalen v. United States*, 445 U.S. 684, 693-94, 100 S.Ct. 1432, 1439, 63 L.Ed.2d 715 (1980) (rape and felony murder where the rape was the predicate crime are the same offense under *Blockburger*); *Brown v. Ohio*, 432 U.S. 161, 168, 97 S.Ct. 2221, 2226, 53 L.Ed.2d 187 (1977) (crimes of joyriding and auto theft are "'the same statutory offense' within the meaning of the Double Jeopardy Clause"); see also *U.S. v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (test applied to determine whether conviction of criminal contempt of court barred subsequent prosecution for the offense which was the basis for the

contempt prosecution); *Albernaz v. United States*, 450 U.S. 333, 338-39, 101 S.Ct. 1137, 1142, 67 L.Ed.2d 275 (1981) (consecutive sentences for conspiracy to import marijuana and conspiracy to distribute marijuana permissible because "although the objects of the conspiracies may partially overlap," *Blockburger* was satisfied by the fact that the statutes necessitated the proof of different, non-overlapping ends of the conspiracy).

Any indication the Court once may have given that *Blockburger* provided a unitary test for determining whether offenses were the same and whether the Double Jeopardy Clause was violated has since been disavowed. In a series of cases beginning with *Brown v. Ohio* and culminating with *Missouri v. Hunter*, the Supreme Court has stated that, at least in multiple punishment cases, the role of the Double Jeopardy Clause is limited to protecting a defendant against receiving more punishment than the legislature intended. See *Brown v. Ohio,* 432 U.S. at 165, 97 S.Ct. at 2225 ("Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."); *Whalen v. U.S.*, 445 U.S. at 688, 100 S.Ct. at 1436 ("[T]he

question whether punishments ... are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized."); *Missouri v. Hunter,* 459 U.S. at 366, 103 S.Ct. at 678 ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."); see also *United States v. Halper*, 490 U.S. 435, 450, 109 S.Ct. 1892, 1902-03, 104 L.Ed.2d 487 (1989).[3]

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[3] Petitioners assert that this area of law has come full circle: the Supreme Court overruled *Hunter* and its antecedents in *Dixon,* and returned to a unitary test, based on Blockburger, for determining whether two offenses are the same offense for double jeopardy purposes, and whether the total punishment imposed for multiple offenses violates double jeopardy. As evidence of this, they point to two sentences from *Dixon* in which Justice Scalia writes for the Court:

> In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test the double jeopardy bar applies.... The same-elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an

> element not contained in the other; if not, they are the "same offense" and double jeopardy bars additional punishment and successive prosecution.

U.S. v. Dixon, 509 U.S. at ----, 113 S.Ct. at 2856 (citing *Brown v. Ohio,* 432 U.S. at 168-69, 97 S.Ct. at 2226-27).

The State asserts that Petitioners have taken the quoted passage out of context and that, in the context of the Dixon opinions, it is clear that the passage does not stand for the broad principle Petitioners espouse:

> Todd ... attempts to inflate this sentence from *Dixon* [quoted above] as establishing Blockburger as a conclusive test to be used in all double jeopardy cases. *Dixon,* however involved only the successive prosecution element of the Double Jeopardy Clause; it presented no multiple punishment issue.... Viewed in this light, the statement Todd relies upon is nothing more than one of historical fact, i.e. the Court has applied Blockburger in both multiple punishment and successive prosecution cases.... If Todd's interpretation is correct, then *Dixon*, in effect, overruled [the Whalen-Albernaz- Hunter line of cases] sub silentio.

Respondent's Brief at 14-15 (emphasis in original).

The State offers the more plausible reading of *Dixon.* Considering the lengths to which the Court went to justify

In the later cases, the Supreme Court has employed the *Blockburger* test as a statutory interpretation screening tool to educe the intent of the legislature. See *Hunter*, 459 U.S. at 366-67, 103 S.Ct. at 678; *Albernaz*, 450 U.S. at 340, 101 S.Ct. at 1143; Whalen, 445 U.S. at 691, 693-95, 100

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overruling *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), in which the Court held that the Double Jeopardy Clause barred a subsequent prosecution if that prosecution required the government to prove conduct that constituted an offense for which the defendant already had been prosecuted, see *Dixon,* 113 S.Ct. at 2859-64, Petitioners' contention that the Court overruled the *Whalen-Albernaz- Hunter* line of cases without comment is not persuasive. Moreover, as the State points out, Justice Scalia, the author of the passage on which Petitioners' argument hinges, in a later case implicitly acknowledged that the double jeopardy prohibition against multiple punishments was not coextensive with the Blockburger test:

> Thus, in the context of criminal proceedings, legislatively authorized multiple punishments are permissible if imposed in a single proceeding, but impermissible if imposed in successive proceedings.

Dep't of Revenue of Montana v. Kurth Ranch, --- U.S. ----, ---- n. 1, 114 S.Ct. 1937, 1957 n. 1, 128 L.Ed.2d 767 (1994) (Scalia, J., dissenting) (citing *Hunter,* 459 U.S. at 368-69, 103 S.Ct. at 679).

S.Ct. at 1437, 1438-39. If the statutes pass muster under the *Blockburger* test, cumulative punishment is presumptively allowable. See *Hunter,* 459 U.S. at 367, 103 S.Ct. at 678-79 ("[C]umulative punishment can presumptively be assessed after conviction for two offenses that are not the 'same' under *Blockburger.*"). If they fail it, cumulative punishment is presumptively barred. See *Whalen,* 445 U.S. at 691-92, 100 S.Ct. at 1437-38 ("The assumption underlying the rule [of statutory construction from Blockburger] is that Congress ordinarily does not intend to punish the same offense under two different statutes."). The presumption against multiple punishment is, however, rebuttable. Thus, the analysis continues with a determination of whether the legislature intended to allow multiple punishments for those offenses that fail the *Blockburger* test. See *Garrett v. United States,* 471 U.S. 773, 779, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985) ("We have recently indicated that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history."); *Albernaz,* 450 U.S. at 340, 344, 101 S.Ct. at 1143, 1145 ("[T]he [*Blockburger*] rule should not be controlling where ... there is a clear indication of contrary legislative intent."; "Where Congress intended, as it did here, to impose multiple

punishments, imposition of such sentences does not violate the Constitution."); *Whalen*, 445 U.S. at 692, 100 S.Ct. at 1438 ("[W]here two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.").

On the basis of our examination of the language and legislative history of the felony-murder statute, AS 11.41.110(a)(3), we conclude that the legislature intended to allow multiple punishments for felony murder and the predicate offense of robbery.[4]

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[4] The sequence of the analysis is not important; a court should derive the same result whether it applies the Blockburger test and then examines legislative intent or first looks to legislative intent in the hope of obviating the need for further analysis. See *Hunter*, 459 U.S. at 368-69, 103 S.Ct. at 679 ("Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end...."). Because we conclude that the legislature's intent is clear, we need not determine whether the Alaska felony-murder and robbery statutes are the "same" under *Blockburger*. We note, however, the Supreme Court's holding in *Whalen*--that the District of Columbia's rape and felony murder offenses are the same offense under *Blockburger*--suggests they are.

The drafters' commentary to AS 11.41.110(a)(3) is the first source of evidence that the legislature intended to allow multiple punishments:

> In considering the Revised Code's approach to the felony murder statute, it must be recalled that the purpose of a felony murder rule is to deter all killings during the commission of felonies which involve a high potential for violence. By holding the felon liable for an unintended and even accidental death occurring in the course of or in furtherance of a felony, the rule provides a powerful incentive not to commit inherently dangerous crimes, or at the very least to plan and carry out such crimes with increased regard for physical dangers.
>
> For all practical purposes, Alaska does not now have a felony murder rule.... Consequently, an accidental killing occurring during the commission of an enumerated felony does not render the actor guilty of felony murder under the existing statute.

> Subsection (a)(3) [the felony murder provision] specifically eliminates the Gray requirement that a felon "purposely" kill during the commission of an enumerated felony.

Alaska Criminal Code Revision, Tentative Draft, Part 1, pp. 27-29, quoted in *Todd*, 884 P.2d at 683. Under Alaska law prior to the 1980 revision, an actor who unintentionally caused a death during the course of a felony was subject to prosecution for the felony and for manslaughter. See *Gray v. State*, 463 P.2d 897, 906 (Alaska 1970) (no felony-murder provision under Alaska law; absent an intent to kill, only conviction for manslaughter is permissible); see also *Keith v. State*, 612 P.2d 977, 987-88 (Alaska 1980) (describing *Gray* as establishing a "felony-manslaughter rule"); *Jacinth v. State*, 593 P.2d 263 (Alaska 1979) (upholding convictions for arson and manslaughter for death caused by fire). The commentary to the rule makes clear the legislature's intent to make the penalty for killings caused during felonies more severe than under the then-existing felony-manslaughter rule. This can be accomplished predictably only by allowing multiple punishments for felony murder and the underlying felony. Absent multiple punishment, the defendant such as *Jacinth*,

convicted of both manslaughter and the accompanying felony, may face a greater sentence than a defendant convicted under the ostensibly more severe felony-murder statute. Compare AS 12.55.125(b) (sentence for felony murder at least five years but not more than 99 years) with AS 12.55.025(e)-(h) and AS 12.55.125(c) (sentence for each class A felony carries term of up to 20 years, with a presumptive term of five years for each, sentences to run consecutively). Moreover, as the court of appeals observed, "[n]othing in the legislative history of Alaska's felony-murder statute, and nothing in any subsequent legislation, indicates legislative dissatisfaction with the result in *Jacinth*--the Alaska Supreme Court's decision that a single criminal act (arson) will support separate convictions for both the felony and a resulting homicide." *Todd,* 884 P.2d at 684.

Further evidence of the legislature's intent to allow cumulative punishment is found in the limited exception to the felony-murder statute for a burglary with murder as its object. AS 11.41.115(c) provides:

> A person may not be convicted of murder in the second degree under AS 11.41.110(a)(3) [the felony-murder statute] if

> the only underlying crime is burglary, the sole purpose of the burglary is a criminal homicide, and the person killed is the intended victim of the defendant. However, if the defendant causes the death of any other person, the defendant may be convicted of murder in the second degree under AS 11.41.110(a)(3). Nothing in this subsection precludes a prosecution for or conviction of murder in the first degree or murder in the second degree under AS 11.41.110(a)(1) or (2) or of any other crime, including manslaughter or burglary.

The commentary to this subsection provides:

> Subsection (c) was referred to at the Criminal Law Subcommission meetings as the "felony-murder merger doctrine." In considering this extremely limited exemption from the felony-murder rule, it must be recalled that the purpose of the rule is to diminish the risk of unintentional or even accidental killings during the commission of violent felonies. One of these felonies,

burglary in the first degree, occurs when a person enters a dwelling with intent to commit a crime. If a person commits burglary in the first degree by breaking into a house with intent to kill the occupant, the felony-murder rule would have no deterrent effect. Permitting a conviction for murder under the felony-murder rule in this circumstance would also have the effect of preventing the jury from considering whether the defendant acted in the "heat of passion."

The Code does not permit a conviction for felony-murder in this situation; the felony is said to "merge" with the homicide. Of course, the defendant can still be charged with first or second degree murder for the intentional killing. The effect of the felony-murder merger doctrine is to prohibit a second-degree murder conviction solely on proof that the defendant committed first degree burglary by entering a dwelling with intent to kill the occupant.

1978 Senate Journal 1399, Supp. No. 47 (June 12), p. 12, quoted in *Todd,* 884 P.2d at 684-85. On the basis of this language, the court of appeals concluded that, "because the legislature enacted a special provision to merge the two potential offenses in this specific situation, the legislature must have intended that defendants in other felony-murder situations would be subject to conviction and punishment for the homicide and the underlying felony." *Todd*, 884 P.2d at 685-86. We agree with that conclusion.

Our conclusion that the legislature intended to allow multiple punishments is also based upon the distinct nature of the interests protected by the felony-murder and robbery statutes.

> Specifically, upon reviewing the statutory scheme devised by our legislature, we believe that it sought to protect against two separate societal interests when it enacted the felony murder statute and the robbery statute. In essence, the robbery statute is intended to protect against robbery only, while the felony murder statute seeks to protect against homicides. In light of this intent to protect

> against two separate evils, we must conclude that the legislature intended two separate punishments when a defendant violates both statutes.

Talancon v. State, 102 Nev. 294, 721 P.2d 764, 768 (1986). See also *State v. Greco,* 216 Conn. 282, 579 A.2d 84, 90-91 (1990); *State v. Blackburn,* 694 S.W.2d 934, 937 (Tenn.1985).

It is true, as Todd and Harvey point out, that both the robbery and the homicide provisions are contained in Chapter 41 of the criminal code, "Offenses Against the Person." However, contrary to Todd's and Harvey's contention, this fact does not lead to the "inescapable" conclusions that the societal interests sought to be protected are "virtually identical" and that the legislature did not intend to allow multiple punishments. An examination of some of the other offenses in Chapter 41 reveals the speciousness of their argument. Sexual assault crimes are included along with robbery and related offenses in Chapter 41. Yet, it cannot be argued seriously that AS 11.41.434, Sexual Abuse of a Minor in the First Degree, and AS 11.41.520, Extortion, protect "virtually identical" societal interests.

For the foregoing reasons, we conclude that the Alaska legislature intended to authorize separate convictions and cumulative punishments for felony murder and the predicate felony of robbery. We hold that the Double Jeopardy Clause of the Fifth Amendment does not bar Todd's and Harvey's consecutive sentences.

C. Alaska Double Jeopardy Law

Alaska has its own constitutional provision relating to double jeopardy. See note 2, supra. This court is free to interpret the state constitutional provision as it sees fit, so long as the interpretation does not undermine the minimum protections established by the United States Supreme Court in decisions interpreting the federal constitution. *Whitton v. State,* 479 P.2d at 309.

Whitton is the seminal case and still controlling precedent in this area of law. In Whitton, this court held the Double Jeopardy Clause of the Alaska Constitution barred multiple punishments for "one or 'the same' offense." Id. at 310. After considering and rejecting the Blockburger and other tests, id. at 310, this court developed its own test for determining whether several statutory violations constitute the

same offense for double jeopardy purposes:

> The trial judge first would compare the different statutes in question, as they apply to the facts of the case, to determine whether there were involved differences in intent or conduct. He would then judge any such differences he found in light of the basic interests of society to be vindicated or protected, and decide whether those differences were substantial or significant enough to warrant multiple punishments....
>
> If such differences in intent or conduct are significant or substantial in relation to the social interests involved, multiple sentences may be imposed, and the constitutional prohibition against double jeopardy will not be violated. But if there are no such differences, or if they are insignificant or insubstantial, then only one sentence may be imposed under double jeopardy.

Id. at 312.

Applying the *Whitton* test, we conclude that felony

murder and robbery are not the same offense for double jeopardy purposes; therefore, Petitioners' consecutive sentences are allowable. The statutes differ significantly in the intent and conduct required; the most obvious difference is the requirement under the felony-murder statute that someone have been killed. Moreover, as we discussed above, the statutes also protect different societal interests. The felony-murder statute protects against the loss of human life. "In contrast, the basic rationale of the robbery statutes is protection against the terror of the forcible taking." *Greco*, 579 A.2d at 91 (internal quotations omitted); see also *Jacinth*, 593 P.2d at 267 ("Here the separate statutory offenses to be considered are those of second degree arson and manslaughter. Since the former protects a property interest and the latter the paramount personal interest of protection of human life, we hold that they should be considered separate offenses under the Whitton test.").

The legal concept of greater and lesser-included offenses is "related to, but distinguishable from, the question considered in *Whitton* ... concerning when separate punishment may be imposed for separate statutory offenses arising out of the same conduct." *Tuckfield v. State*, 621 P.2d at 1352. *Tuckfield* was convicted of rape and assault

with intent to rape in connection with one criminal episode and appealed the rape conviction on evidentiary grounds. Id. at 1352. This court affirmed the rape conviction, but concluded that rape and assault with intent to rape stood in the relationship of greater and lesser-included offenses and that the double jeopardy clause barred conviction of both. Id.

We believe that robbery, although a predicate felony for felony murder, is not a lesser-included offense of felony murder, and we therefore conclude that *Tuckfield* is inapplicable in the present context.

In our view, the offenses encompass different constituent elements. See *Christie v. State,* 580 P.2d 310, 317 (Alaska 1978) ("[T]he included offense must be less than the charged offense in terms of its constituent elements."). Murder, unlike robbery, has as an element that someone have been killed; robbery, unlike murder, has as an element the taking or attempted taking of property. This view has been adopted by the highest court of at least one state. See *State v. Gonzales,* 245 Kan. 691, 783 P.2d 1239, 1249 (1989) ("Clearly, the elements of rape are not included in the elements of murder ... the defendant was properly convicted of both attempted rape and felony murder.").

However, because a defendant cannot be convicted of felony murder with robbery as a predicate without having been convicted of robbery, robbery would appear to be a lesser-included offense of felony murder under the formulation that "to be necessarily included in the greater offense, the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *Christie,* 580 P.2d at 317 (quoting *Giles v. United States,* 144 F.2d 860, 861 (9th Cir.1944)).

That formulation notwithstanding, we view felony murder as a distinct area of the criminal law not governed by traditional lesser-included offense analysis. See *Gonzales,* 245 Kan. 691, 783 P.2d at 1248 ("The flaw in defendant's argument [that convictions for both felony murder and the predicate felony are barred because greater and lesser-included offenses] is that he fails to recognize the distinction between the 'lesser included offense' doctrine and the 'felony-murder' doctrine. Each is a separate theory of law."). Traditional lesser-included offense analysis involves examining offenses with overlapping elements and normally arises in two contexts: where a defendant has been convicted of separate statutory offenses for the same conduct and it is not clear whether the legislature intended the defendant be

punished under both statutory provisions, and where a defendant's conduct possibly constitutes several offenses of varying seriousness and the defendant seeks (or seeks to avoid on an "all or nothing" trial strategy) a lesser-included instruction. See, e.g., *Tuckfield,* 621 P.2d at 1352 (convictions for rape and lesser-included offense of assault with intent to rape impermissible); *Elisovsky v. State,* 592 P.2d 1221 (Alaska 1979) (defendant charged with assault with a dangerous weapon (a gun) entitled to instruction on lesser-included offense of careless use of a firearm). The felony-murder provision does not overlap with other offenses but rather enhances them, and, as we noted above, the intent of the legislature to allow multiple punishments is clear. See *State v. McCovey,* 803 P.2d 1234, 1237-39 (Utah 1990) ("Despite the fact that under the [same-elements] analysis aggravated robbery would be a lesser included offense of felony murder, we recognize that enhancement statutes are different in nature than other criminal statutes."; "A true lesser included relationship does not exist in the felony murder statute...."). Because we conclude that the predicate felony of robbery is not a lesser-included offense of felony murder, our decision today does not affect the conclusion reached in Tuckfield that conviction of both a greater and

lesser-included offense is barred by double jeopardy.[5] We disavow any suggestion in the court of appeals' opinion that *Tuckfield* is mistaken and should be overruled. See *Todd*, 884 P.2d at 681-82 (describing *Tuckfield* as "erroneous").

D. The Assault Conviction

Petitioners also assert that their convictions for assault in the third degree against George Gillis should be merged into the felony-murder conviction. This argument is without merit. This court has held that a single assaultive act constitutes a separately-punishable assault for each victim, *Cooper v. State*, 595 P.2d 648 (Alaska 1979), and that the robbery of each of several victims constitutes a separate and distinct criminal offense, *Davenport v. State*, 543 P.2d 1204, 1209 (Alaska 1975) ("an intent to harm multiple victims will lift the veil of protection which the double jeopardy doctrine

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[5] The validity of the distinction we draw today between felony murder and traditional lesser-included analysis is further evidenced by the fact that the situation in which a defendant is convicted of felony murder and also a felony which would be a lesser-included offense of homicide under traditional lesser-included analysis is never likely to arise. This is so because Alaska's felony-murder statute does not include assault among the predicate felonies. See AS 11.41.110(a)(3).

might otherwise afford to a defendant"). Petitioners' convictions for the assault on one victim and the robbery of a second victim are entirely consistent with the principles of double jeopardy and the precedent of this court.

IV. CONCLUSION

Petitioners' consecutive sentences for felony murder and the predicate felony of first-degree robbery do not violate the Double Jeopardy Clauses of the United States and Alaska Constitutions.

AFFIRMED.

Robyn A. TODD, Appellant,

v.

STATE of Alaska, Appellee.

No. A-4618

Court of Appeals of Alaska.

October 21, 1994

Blair McCune, Assistant Public Defender, and John B. Salemi, Public Defender, Anchorage, for Appellant.

Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Charles E. Cole, Attorney General, Juneau, for Appellee.

Before BRYNER, C.J., COATS, and MANNHEIMER, JJ.

OPINION

MANNHEIMER, Judge.

Robyn A. Todd and an accomplice, Joseph Harvey, robbed the Hub Bar in Anchorage. They forced their way into the office at gunpoint and threatened the owner, Lloyd Dahl, and two employees, Nancy Jourdan and George Gillis.

Todd led Gillis to another area of the bar, while Harvey stayed with Dahl in the office. Harvey directed Dahl to give him the bar's cash receipts. When Dahl resisted, he was shot and killed. Jourdan heard the gun shot from outside the office; she fled the bar and flagged down a passing community patrol van. The police were quickly summoned and, after a brief armed confrontation, Todd and Harvey were arrested.

Todd was convicted of the first-degree robbery of Lloyd Dahl, AS 11.41.500(a)(1), the second-degree murder of Lloyd Dahl, AS 11.41.110(a)(3), and the third-degree assault of George Gillis, AS 11.41.220(a)(1). At his sentencing, Todd argued that the double jeopardy clauses of the Federal and State Constitutions[1] barred separate sentences for the murder, robbery, and assault. Superior Court Judge Rene J. Gonzalez disagreed, ruling that Todd could constitutionally receive separate sentences for these three crimes.

On appeal, Todd renews his argument that he can

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[1] The Fifth Amendment to the United States Constitution and Article I, Section 9 of the Alaska Constitution.

only be sentenced for murder--that the double jeopardy clauses of the Federal and State Constitutions bar his receiving separate convictions and punishments for the robbery and assault.[2]

The propriety of Todd's separate conviction and sentence for the third-degree assault of George Gillis is the easier issue. The Alaska Supreme Court has held that a defendant who victimizes two or more people by a single assaultive act commits a separately punishable assault for each victim. *Cooper v. State,* 595 P.2d 648 (Alaska 1979). Likewise, a single act of recklessness that kills two or more people constitutes a separately punishable manslaughter for each victim. *State v. Dunlop,* 721 P.2d 604 (Alaska 1986). Thus, even if the assault on Gillis had arisen from exactly the same act as the assault and killing of Dahl, it still would constitute a separately punishable crime under Alaska law.

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[2] Because Todd was tried and convicted of his various offenses at a single trial, his case does not involve the double jeopardy clause's limitation on multiple trials. Rather, Todd's case involves only the double jeopardy clause's prohibition of multiple punishments for the same criminal act. See *Missouri v. Hunter,* 459 U.S. 359, 365-66, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983).

We turn now to the constitutionality of Todd's robbery conviction. Todd's argument rests on two premises: first, that robbery is a lesser included offense of felony murder, and second, that it is unconstitutional to separately punish anyone for both a greater offense and an included offense.

> Todd's most serious offense, felony murder, is a form of second-degree murder under AS 11.41.110(a)(3):

A person commits the crime of murder in the second degree if

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> (3) acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree, sexual assault in the second degree, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from that crime, any person causes the death of a person other

than one of the participants.

The State concedes that, under Alaska's cognate approach to lesser included offenses, announced in *Elisovsky v. State,* 592 P.2d 1221, 1225-26 (Alaska 1979), and in light of the way Todd's offenses were pleaded, first-degree robbery was a lesser included offense of felony murder in Todd's case. This concession would seem to resolve this litigation in Todd's favor because of two previous Alaska decisions: *Tuckfield v. State,* 621 P.2d 1350 (Alaska 1981), and *Hughes v. State,* 668 P.2d 842 (Alaska App.1983).

In *Tuckfield,* the defendant had been convicted of both rape and assault with intent to commit rape arising from a single assault. The supreme court ruled that, under the theory of *Tuckfield*'s prosecution, assault with intent to commit rape had been a lesser included offense of the completed rape. The court then held that the double jeopardy clause prohibited separate convictions for both the greater offense and the lesser included offense:

> It is well settled that [the] double jeopardy [clause] is violated by conviction of both an offense and a lesser included offense,

> unless the convictions arise from separate conduct. E.g., *In re Dennis B.* [18 Cal.3d 687], ... 135 Cal.Rptr. 82, 557 P.2d 514 (Cal.1976); *People v. Brown* [185 Colo. 272], ... 523 P.2d 986, 988 (1974). [This] rule is related to, but distinguishable from, the question considered in *Whitton v. State*, [479 P.2d 302 (Alaska 1970)] ... concerning when separate punishment[s] may be imposed for separate statutory offenses arising out of the same conduct.... A lesser included offense may differ in terms of conduct or intent from the greater offense [for *Whitton* purposes]. However, a conviction of both will still be proscribed by the double jeopardy bar.

Tuckfield, 621 P.2d at 1352.

Two years later, this court applied the *Tuckfield* holding in *Hughes v. State*. Hughes was charged with first-degree murder and attempted armed robbery under Alaska's former criminal code. A jury found him guilty of attempted armed robbery but was unable to agree on a first-degree murder verdict. *Hughes*, 668 P.2d at 843. To

resolve the murder charge, Hughes entered a plea to manslaughter. However, he argued that, under *Tuckfield*, the double jeopardy clause barred separate convictions for manslaughter and robbery because the robbery had been a lesser included offense of the manslaughter. Id. at 843-44.[3]

The State attempted to avoid *Tuckfield* by arguing, "[w]ithout any analysis, ... that attempted armed robbery is not a lesser included offense of manslaughter." Id. at 844. This court rejected the State's argument, declaring:

> The principle that an underlying felony is a lesser-included offense of a felony homicide is well supported by federal and state case law.... Under [the] theory of manslaughter [presented by the State (that is, that an unintentional killing occurred during Hughes's commission of armed robbery)], the attempted armed robbery is a lesser included offense of the

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[3] Under Alaska's pre-1980 criminal code, a homicide committed during the commission of a felony was first-degree murder if the defendant acted with intent to kill; otherwise, the homicide was manslaughter. *Keith v. State*, 612 P.2d 977, 987-88 (Alaska 1980); *Gray v. State*, 463 P.2d 897, 906 (Alaska 1970).

> manslaughter charge. We therefore hold that *Tuckfield* requires us to find that convicting Hughes of both attempted robbery and manslaughter violated double jeopardy....

Hughes, 668 P.2d at 844-45 & n. 6.

In the present appeal, Todd relies heavily on *Tuckfield* and *Hughes.* The State, for its part, argues that *Tuckfield* should be limited to its facts and that *Hughes* was wrongly decided. The State's argument, like the trial court's ruling, rests on the supreme court's decision in *Whitton v. State,* 479 P.2d 302 (Alaska 1970).

Whitton is the supreme court's seminal decision on the issue of "whether separate punishments may be imposed for the commission of separate statutory offenses arising from a single criminal event". 479 P.2d at 305. After surveying the United States Supreme Court's decisions on this issue, our supreme court chose to adopt a different approach as a matter of state constitutional law:

> In determining whether several statutory violations constitute the same offense for double jeopardy purposes, we will no longer

follow the same-evidence test as enunciated in *Blockburger v. United States* [284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932).] ... We now meet the problem in another way, ... by focusing upon the quality of the differences, if any exist, between the separate statutory offenses, as such differences relate to the basic interests sought to be vindicated or protected by the statutes.

The trial judge first would compare the different statutes in question, as they apply to the facts of the case, to determine whether [they] involved differences in intent or conduct. [The judge] would then [analyze] any such differences ... in light of the basic interests of society to be vindicated or protected, and decide whether those differences were substantial or significant enough to warrant multiple punishments. The social interests to be considered ... include the nature of personal, property[,] or other rights sought to be protected, and the broad objectives of [the] criminal law[,] such as

> punishment of the criminal for his crime, rehabilitation of the criminal, and prevention of future crimes.

Whitton, 479 P.2d at 312.

Here, when Todd raised the double jeopardy issue in the superior court, Judge Gonzalez agreed that robbery was a lesser included offense of felony murder in Todd's case; that is, if Todd committed felony murder as alleged, he perforce committed first-degree robbery. Nevertheless, Judge Gonzalez ruled that the differences in intent and conduct between robbery and felony murder were substantial enough to justify separate convictions and sentences under *Whitton*.

Todd asserts that the trial court's ruling violates both Alaska law and federal law. With regard to Alaska law, Todd argues that the Alaska Supreme Court's decision in *Tuckfield* establishes the hard-and-fast rule that separate convictions are never allowed when one of a defendant's crimes is a lesser included offense of the other, even though the two offenses arguably have sufficient differences in intent and conduct to satisfy the *Whitton* test. With regard to federal law, Todd argues that *Blockburger v. United States*,

284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932), establishes the same rule--that a defendant can never be convicted of two offenses when one is a lesser included offense of the other.

Federal Double Jeopardy Law

The double jeopardy clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), prohibits a government from twice putting a defendant in jeopardy for the "same offense". The Supreme Court has interpreted this clause to embody two different protections for criminal defendants. First, the clause contains a protection against successive prosecutions; it prohibits the government from trying a defendant twice for the same offense (regardless of whether the first trial ended in conviction or acquittal). Second, the clause contains a protection against double punishment; it prohibits the government from convicting and sentencing a defendant twice for what amounts to the same offense, even though that single offense might be divided into ostensibly separate offenses in the charging document and in the court's judgement of conviction. *North Carolina v. Pearce,* 395 U.S.

711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), modified on other grounds, *Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). For a good discussion of this topic, see Judge Charles E. Moylan's double jeopardy exegesis in *Mauk v. State,* 91 Md.App. 456, 605 A.2d 157 (1992).

In *Blockburger,* the United States Supreme Court developed a test for determining whether two offenses are the "same offense" for double jeopardy purposes. *Blockburger,* 284 U.S. at 304, 52 S.Ct. at 182. Under the *Blockburger* test, the elements of the two offenses are compared: if each offense requires proof of an element that the other does not, then the offenses are separate; but if one offense encompasses all the elements of the other (that is, if the two offenses stand in the relationship of greater and lesser included), then, for double jeopardy purposes, they are deemed the same offense. *Blockburger,* 284 U.S. at 304, 52 S.Ct. at 182. See also *Brown v. Ohio,* 432 U.S. 161, 165-66, 97 S.Ct. 2221, 2225-26, 53 L.Ed.2d 187 (1977).

The *Blockburger* test seemingly provided a simple method for ascertaining the requirements of the federal double jeopardy clause. However, in a series of later cases,

the Supreme Court held that, at least in instances when all the charges against a criminal defendant are combined at a single trial (so that the protection against successive prosecutions is not involved), the role of the double jeopardy clause is limited to protecting a defendant against receiving more punishment than the legislature intended. See *United States v. Halper,* 490 U.S. 435, 450, 109 S.Ct. 1892, 1903, 104 L.Ed.2d 487 (1989) (The double jeopardy clause only "ensur[es] that the [defendant's] total punishment did not exceed that authorized by the legislature".); *Brown v. Ohio,* 432 U.S. at 165, 97 S.Ct. at 2225 ("[T]he role of the constitutional guarantee is limited to assuring that the [sentencing] court does not exceed its legislative authorization.").

Having adopted this interpretation of the double jeopardy clause, the Supreme Court concomitantly construed the *Blockburger* test as being only a tool of statutory construction--a means of ascertaining legislative intent. If a legislature indicates that it wishes cumulative punishment for two offenses, then the Federal Constitution allows cumulative punishment even though the two offenses might be the "same" under the *Blockburger* test. This limited role of *Blockburger* was clarified by the Supreme Court's decisions

in two cases: *Whalen v. United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and *Missouri v. Hunter,* 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

Whalen involved a District of Columbia prosecution for rape and felony murder committed during the rape; the defendant was convicted of both offenses and received cumulative punishment for these two crimes. He appealed, contending that his dual punishment for both felony murder and the underlying felony violated the double jeopardy clause. *Whalen,* 445 U.S. at 685-86, 100 S.Ct. at 1434.

The Supreme Court declared that "the question whether [a defendant's] punishments ... are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Whalen,* 445 U.S. at 688, 100 S.Ct. at 1436. The Court continued:

> [I]f Congress has not authorized cumulative punishments for rape and for an unintentional killing committed in the course of rape, ... the petitioner has been impermissibly sentenced. The dispositive question, therefore, is whether Congress did so provide.

Whalen, 445 U.S. at 688-89, 100 S.Ct. at 1436.

The Court interpreted a portion of the District of Columbia Code, Sec. 23-112 (1973), as expressing Congress's intention to prohibit consecutive sentences whenever two offenses would be considered the "same offense" under the *Blockburger* test. *Whalen,* 445 U.S. at 690-93, 100 S.Ct. at 1437-38. The Court then ruled that, under the *Blockburger* test, the District of Columbia's felony-murder statute defined the "same offense" as any of its six underlying felonies. *Whalen,* 445 U.S. at 693-94, 100 S.Ct. at 1439.[4] Thus, the Court held, the defendant in *Whalen* had unlawfully been subjected to multiple punishment. However, the Court took some pains to emphasize the limited nature of its decision--to stress that its decision rested on statutory grounds:

> Congress is clearly free to fashion

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[4] When interpreting the criminal law that Congress has enacted to govern the District of Columbia, the Supreme Court is free to interpret the federal statutes without regard to the rulings of the lower federal courts--different from the normal rule in which the Supreme Court is "barred from reviewing a state court's interpretation of a state statute". *Whalen,* 445 U.S. at 687-88, 100 S.Ct. at 1435.

> exceptions to the rule it chose to enact in Sec. 23-112 [limiting consecutive sentences]. A court, just as clearly, is not. Accordingly, notwithstanding the arguments advanced by the Government in favor of imposing consecutive sentences for felony murder and for the underlying felony, we do not speculate about whether Congress, had it considered the matter, might have agreed. It is sufficient for present purposes to observe that a congressional intention to change the general rule of Sec. 23-112 for the circumstances here presented nowhere clearly appears.

Whalen, 445 U.S. at 695, 100 S.Ct. at 1439.

The statutory basis of the *Whalen* decision was confirmed three years later in *Missouri v. Hunter,* 459 U.S. at 365-370, 103 S.Ct. at 678-79. *Hunter* involved a defendant who had been convicted at a single trial of both armed robbery and "armed criminal action", an offense defined by the Missouri legislature as "commit[ting] any felony ... by, with, or through the use, assistance, or aid of a dangerous or deadly weapon". *Hunter,* 459 U.S. at 362, 103

S.Ct. at 676.

Even though the Missouri statute defining "armed criminal action" explicitly provided that "[t]he punishment imposed pursuant to this [statute] shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon," id., the Missouri Court of Appeals reversed Hunter's conviction for armed criminal action. Relying on a previous decision of the Missouri Supreme Court deciding the same issue[5], the Missouri Court of Appeals held that, under the *Blockburger* test, "armed criminal action" was the same offense (for double jeopardy purposes) as the underlying felony of armed robbery, and therefore the Missouri legislature had no authority to order cumulative punishment for the two crimes. *Hunter,* 459 U.S. at 362-63, 103 S.Ct. at 676.

The United States Supreme Court reversed the Missouri court's decision, declaring that the Missouri court's ruling "manifests a misreading of our cases on the meaning

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[5] See *Sours v. State,* 603 S.W.2d 592 (Mo.1980), cert. denied, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981).

of the Double Jeopardy Clause of the Fifth Amendment". *Hunter,* 459 U.S. at 365, 103 S.Ct. at 677.

> Because [*Hunter*] has been subjected to only one trial, it is not contended that his right to be free from multiple trials for the same offense has been violated. Rather, the Missouri court vacated [his] conviction for armed criminal action because of the statements of this Court that the Double Jeopardy Clause also "protects against multiple punishments for the same offense". *North Carolina v. Pearce*[.] Particularly in light of recent precedents of this Court, it is clear that the Missouri Supreme Court has misperceived the nature of the Double Jeopardy Clause's protection against multiple punishments. With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.

Hunter, 459 U.S. at 365-66, 103 S.Ct. at 678 (citation

omitted).

Returning to its decision in *Whalen*, the Court stated that it was "clear ... that the result in *Whalen* turned on the fact that the Court saw 'no clear indication of contrary legislative intent.'" *Hunter,* 459 U.S. at 367, 103 S.Ct. at 678. The Court then quoted its decision in *Albernaz v. United States,* 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), where the Court held that cumulative punishments could be imposed for conspiracy to import marijuana and conspiracy to distribute marijuana:

> The *Blockburger* test is a "rule of statutory construction," and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent.
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> ....
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> The question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to

> impose multiple punishments, imposition of such sentences does not violate the Constitution.

Hunter, 459 U.S. at 367-68, 103 S.Ct. at 679 (quoting *Albernaz*, 450 U.S. at 340 & 344, 101 S.Ct. at 1143 & 1145) (emphasis by the *Hunter* court).

The United States Supreme Court recognized that the Missouri Supreme Court had "construed the two statutes at issue as defining the same crime" under the *Blockburger* test, and the Supreme Court further recognized that it was "bound to accept the Missouri court's construction of that State's statutes". *Hunter*, 459 U.S. at 368, 103 S.Ct. at 679. "However," the Supreme Court declared, "we are not bound by the Missouri Supreme Court's legal conclusion that these two statutes violate the Double Jeopardy Clause, and we reject its legal conclusion." Id.

> Our analysis and reasoning in *Whalen* and *Albernaz* lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does

> not mean that the Double Jeopardy Clause precludes imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.

Hunter, 459 U.S. at 368, 103 S.Ct. at 679 (emphasis added).

Federal courts confronting habeas corpus attacks on state criminal judgements now recognize that the constitutionality of multiple convictions and punishments at a single trial depends on the intention of the state legislature. *Birr v. Shillinger,* 894 F.2d 1160, 1161-62 (10th Cir.1990) (per curiam), cert. denied, 496 U.S. 940, 110 S.Ct. 3224, 110 L.Ed.2d 671 (1990); *Banner v. Davis,* 886 F.2d 777, 780 (6th Cir.1989); *Gillespie v. Ryan,* 837 F.2d 628, 630-32 (3rd

Cir.1988), cert. denied, 488 U.S. 833, 109 S.Ct. 90, 102 L.Ed.2d 66 (1988); *Fallada v. Dugger*, 819 F.2d 1564, 1572-73 (11th Cir.1987); *Deloach v. Wainwright*, 777 F.2d 1524, 1525-26 (11th Cir.1985).

Thus, under *Hunter*, the question of whether Todd's dual conviction for robbery and felony murder violates the federal double jeopardy clause is to be answered by asking another question: Did the Alaska legislature intend for defendants to be separately punished for both felony murder and the underlying felony?[6]

Todd asserts that the *Hunter* analysis has been altered by the Supreme Court's decision in *United States v. Dixon*,

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[6] Because *Hunter* dealt with a state statute that included an express cumulative punishment provision, the *Hunter* decision might arguably be read to require that, before multiple punishments can be imposed for offenses that are "the same" under *Blockburger*, the legislature's intention to impose cumulative punishment must be "clearly" expressed. However, as can be seen from the cases discussed in the next section, most state courts have adopted a more liberal interpretation of *Hunter*; they read *Hunter* to mean that the Federal Constitution allows multiple punishment whenever normal methods of statutory interpretation reveal a legislative intention to allow cumulative punishment for the two offenses.

--- U.S. ----, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). We believe that Todd has misinterpreted *Dixon*.

Dixon involved two defendants who had each been prosecuted for contempt of court: one defendant (Dixon) had been found in contempt for violating the terms of his bail release by committing a new crime (possession of cocaine with intent to distribute); the other defendant (Foster) had been found in contempt for violating a restraining order by assaulting his wife, by threatening on three other occasions to injure her, and by assaulting her with intent to kill. In each case, after the defendant had been punished for contempt of court, the government sought to prosecute him for the underlying crime or crimes that led to his contempt conviction. *Dixon*, 113 S.Ct. at 2853-54. By a 5 to 4 vote, the Supreme Court ruled that Dixon's drug prosecution and one of the charges brought against Foster (the charge of simple assault) violated the federal double jeopardy clause.

Todd argues that the Supreme Court's resolution of *Dixon* shows that he can not be prosecuted for both felony murder and robbery. He analogizes the felony murder charge against him to the contempt of court charges in *Dixon*, since they both required proof of an underlying crime. Todd

construes *Dixon* to mean that whenever one criminal charge requires proof of another underlying crime, a defendant can not be prosecuted for both crimes. However, the facts and the text of *Dixon* do not support Todd's interpretation.

Like the Court's previous decision in *Whalen,* the *Dixon* case arose in the District of Columbia. Thus, as in *Whalen,* the Supreme Court in *Dixon* had the authority to interpret the federal statutes at issue in the appeal and to apply the *Blockburger* test as the rule of construction. Two members of the court (Scalia and Kennedy) resolved *Dixon* on this statutory basis.

Justices Scalia and Kennedy believed that Dixon's drug possession charge and Foster's simple assault charge were barred by the *Blockburger* rule that two criminal offenses are presumptively the "same offense" for double jeopardy purposes if the elements of one are completely subsumed in the elements of the other. *Dixon* had, as a condition of his release, been ordered not to commit any criminal offense. To prove that *Dixon* had violated this condition, the government alleged and proved that *Dixon* had possessed cocaine with intent to distribute. Foster had been under a restraining order prohibiting him from "molest[ing],

assault[ing], or in any manner threaten[ing] or physically abus[ing]" his wife. 113 S.Ct. at 2854. In one of its later five charges against Foster, the government alleged and proved that Foster had assaulted his wife. Justices Scalia and Kennedy held that Dixon's act of drug possession and Foster's act of simple assault were completely subsumed in the elements of the government's proof in the two defendants' contempt prosecutions; thus, the defendants' later prosecutions for these underlying crimes were barred. For this same reason, however, Justices Scalia and Kennedy concluded that the four other assault charges brought against Foster were not barred by the double jeopardy clause, since these charges alleged aggravated assault, and proof of those charges required proof of additional elements (intent to kill, or a threat to kidnap or injure). 113 S.Ct. at 2858-59.

Three other members of the court (White, Stevens, and Souter) believed that the double jeopardy clause barred Dixon's drug prosecution and all of Foster's assault prosecutions--not because of *Blockburger*'s rule of statutory interpretation, but because of the other prohibition contained in the double jeopardy clause: the bar on successive prosecutions arising from the same conduct. Justice White wrote:

[The government's] second, more powerful, argument [in support of the defendants' convictions] is that contempt and the underlying substantive crime constitute two separate offenses for they involve injuries to two distinct interests, the one the interest of the court in preserving its authority, the other the public's interest in being protected from harmful conduct. This position finds support in Justice Blackmun's partial dissent [113 S.Ct. at 2879-2881], and is bolstered by reference to numerous decisions acknowledging the importance and role of the courts' contempt power. [citations omitted] [This argument] cannot lightly be dismissed. Indeed, we recognized in *Young [v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 800, 107 S.Ct. 2124, 2134, 95 L.Ed.2d 740 (1987)] that contempt "proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court. In

> punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings." Id., 481 U.S. at 800, 107 S.Ct. at 2134.
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> The fact that two criminal prohibitions promote different interests may be indicative of legislative intent and, to that extent, important in deciding whether cumulative punishments imposed in a single prosecution violate the Double Jeopardy Clause. See *Missouri v. Hunter,* 459 U.S. 359, 366-368, 103 S.Ct. 673, 678-79, 74 L.Ed.2d 535 (1983). But the cases decided today involve instances of successive prosecutions in which the interests of the defendant are of paramount concern.

Dixon, 113 S.Ct. at 2870-2871 (White, J., concurring) (underlined emphasis added; italicized emphasis in the original). See also the concurring opinion of Justice Souter, 113 S.Ct. at 2881-83. Later in his opinion, Justice White

declared his view that the double jeopardy clause still allows vindication of both the court's interest in preserving its authority through the contempt power and society's interest in enforcing the criminal law. To act in conformance with the double jeopardy clause,

> judges and prosecutors [should] ensure, where necessary or advisable, that the contempt and the substantive charge be tried at the same time, in which case the double jeopardy issue "would be limited to ensuring that the [defendant's] total punishment did not exceed that authorized by the legislature." *United States v. Halper,* 490 U.S. 435, 450, 109 S.Ct. 1892, 1903, 104 L.Ed.2d 487 (1989).

Dixon, 113 S.Ct. at 2873 (White, J., concurring).

The four remaining members of the court (Rehnquist, joined by O'Connor and Thomas; and Blackmun, writing separately) believed that Dixon's and Foster's later prosecutions were entirely proper and were not barred by either the *Blockburger* rule or the prohibition on successive prosecutions. *Dixon,* 113 S.Ct. at 2865-68 (Rehnquist, C.J.,

concurring and dissenting), and 113 S.Ct. at 2879-2881 (Blackmun, J., concurring and dissenting).

Returning to the facts of Todd's case, Todd was prosecuted for felony murder and first-degree robbery at the same trial. The various opinions in Dixon demonstrate that, for defendants convicted of several offenses at the same trial, *Missouri v. Hunter* retains the allegiance of a clear majority of the Supreme Court as the embodiment of the proper federal double jeopardy analysis.[7] That is, for federal double jeopardy purposes, the question of whether Todd could properly be convicted and sentenced for both robbery and

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[7] This same distinction between a single trial and successive trials differentiates *Harris v. Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), from Todd's case. Harris involved a defendant who was tried and convicted for felony murder, then later tried and convicted for armed robbery. *Harris v. State,* 555 P.2d 76, 77-78, 80 (Okla.Crim.App.1976). The Supreme Court summarily reversed Harris's armed robbery conviction, issuing "a three-paragraph per curiam [opinion] in an unargued case". *Dixon*, ---U.S. at ----, 113 S.Ct. at 2865 (Rehnquist, C.J., concurring and dissenting). Significantly, the Supreme Court did not cite *Blockburger* when it reversed Harris's second conviction; rather, the Court cited *Ex parte Nielsen*, 131 U.S. 176, 188, 9 S.Ct. 672, 676, 33 L.Ed. 118 (1889), for the rule that Harris could not be subjected to successive prosecutions.

felony murder depends on whether the Alaska legislature intended to allow cumulative punishment for the two offenses.

Survey of Cases from Other States

State courts are split on the question of whether a defendant can be convicted of both felony murder and the underlying felony. However, the precise contours of this split are hard to gauge. Many of the state court decisions prohibiting dual punishment are premised on a misunderstanding of federal double jeopardy law. These courts believed, erroneously, that the Supreme Court's decisions in *Blockburger, Brown, Whalen,* and *Harris* stood for the rule that the Federal Constitution strictly prohibited state legislatures from punishing a defendant for both felony murder and the underlying felony, even when these two charges were tried at a single trial.[8]

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[8] *State v. Pizzuto,* 119 Idaho 742, 810 P.2d 680, 694-96 (1991), cert. denied, --- U.S. ----, 112 S.Ct. 1268, 117 L.Ed.2d 495 (1992), and *Sivak v. State,* 112 Idaho 197, 731 P.2d 192, 205-08 (1986): The Idaho court relied on Whalen as a statement of constitutional law rather than as a case construing the District of Columbia sentencing statutes. The Idaho court also relied on its previous decision in *State v.*

Thompson, 101 Idaho 430, 614 P.2d 970, 973 (1980), where the court erroneously held, relying on Brown (a successive prosecution case) that the federal double jeopardy clause uniformly forbids cumulative punishment for a greater and a lesser included offense, even when the charges are combined in a single trial.

Munson v. State, 758 P.2d 324, 332 (Okla.Crim.App.1988), cert. denied, 488 U.S. 1019, 109 S.Ct. 820, 102 L.Ed.2d 809 (1989): The Oklahoma court decided to address the dual punishment issue even though "this issue was not raised in the trial court or on appeal". The court then erroneously construed Harris v. Oklahoma (a successive prosecution case) to flatly prohibit cumulative punishment for both felony murder and the underlying felony, even when the convictions and sentences arise from a single trial.

State v. Julius, 185 W.Va. 422, 408 S.E.2d 1, 11-13 (1991): The state conceded that a defendant could not be punished for both felony murder and the underlying felony; the West Virginia court accepted the state's concession, erroneously believing that *Harris v. Oklahoma* was controlling.

State v. Lane, 629 S.W.2d 343, 344 (Mo.1982): The Missouri Supreme Court, in a terse decision that relied on Whalen and did not discuss legislative intent, ruled that the double jeopardy clause did not allow multiple convictions. In a subsequent appeal involving the same case, the Missouri Court of Appeals attempted to place their supreme court's decision on more sustainable footing: the court of appeals declared that the supreme court had reached its decision "only because the Missouri legislature did not intend to allow

conviction of both [offenses]". *Lane v. State,* 778 S.W.2d 769, 772 (Mo.App.1989).

State v. Jones, 525 So.2d 1149, 1151 (La.App.1988): The Louisiana court relied on its supreme court's decision in *State v. Vaughn,* 431 So.2d 763, 766 (La.1983), which erroneously assumed that the *Blockburger* test was a constitutional rule, binding on the states, that defined when cumulative punishment was permissible.

Commonwealth v. Tarver, 493 Pa. 320, 426 A.2d 569 (1981): The Pennsylvania court, erroneously believing that *Blockburger* and *Harris* dictated a merger of offenses as a matter of federal constitutional law, overruled its prior decision in *Commonwealth v. Sparrow,* 471 Pa. 490, 370 A.2d 712 (1977), and held that a defendant could not be separately punished for both felony murder and the underlying felony. Seven years later, in *Gillespie v. Ryan,* 837 F.2d 628 (3rd Cir.1988), cert. denied, 488 U.S. 833, 109 S.Ct. 90, 102 L.Ed.2d 66 (1988), the Third Circuit "reversed" *Tarver* and resuscitated *Sparrow,* at least for federal habeas corpus purposes. The defendant in Gillespie petitioned for federal habeas corpus relief after he was sentenced for both felony murder and an underlying felony. The Third Circuit noted that, in the years since *Tarver* was decided, the United States Supreme Court had clarified that *Blockburger* was simply a rule of construction and that *Harris* was limited to instances of successive prosecutions. *Gillespie*, 837 F.2d at 630-31. The Third Circuit then observed that the Pennsylvania Supreme Court had not re-interpreted state law in *Tarver* but had simply declared the Pennsylvania law to be inconsistent with the Federal Constitution. Because the decision in *Tarver* rested on federal grounds, the Third

Other states have resolved the issue without reaching any question of constitutional law. These states have found that multiple punishments for a greater and a lesser included offense are barred by either a state sentencing statute or by a common-law rule of merger. *Boulies v. People,* 770 P.2d 1274 (Colo.1989) (only one conviction allowed because of a state merger rule); *People v. Raymer,* 662 P.2d 1066, 1068-1070 (Colo.1983) (construing felony murder as an aggravated form of armed robbery); *State v. Ah Choy,* 70 Haw. 618, 780 P.2d 1097, 1099-1100 (1989) (construing felony murder as an aggravated form of armed robbery, and reasoning that the legislature could not have intended cumulative punishment when the mandatory punishment for murder is life imprisonment); *Swaite v. State,* 272 Ark. 128, 612 S.W.2d 307, 308-09 (1981) (construing state statutes to require merger of the convictions); *Candler v. State,* 266 Ind. 440, 363 N.E.2d 1233, 1243 (1977) (state rule of merger); *State v. Fratzke,* 354 N.W.2d 402, 410 (Minn.1984)

Circuit ruled that it was free to apply the correct federal law--that is, the court was free to ignore the erroneous result in *Tarver* and, in fact, was obliged to apply Pennsylvania law as it had been interpreted in *Sparrow.* Thus, the Third Circuit concluded, the defendant's multiple punishments were lawful. *Gillespie,* 837 F.2d at 631-32.

(dictum) (discussion based on a state statute). See also *People v. Wilder*, 411 Mich. 328, 308 N.W.2d 112, 116-121 (1981) (deciding the issue on state constitutional grounds, and recognizing that the result under the Federal Constitution might be different).

We now turn to the state court decisions which (1) decide the issue on federal constitutional grounds and (2) recognize that the federal double jeopardy question hinges on the intent of the state legislature. Of these courts, the great majority uphold separate punishment for felony murder and the underlying felony.

In *State v. Blackburn*, 694 S.W.2d 934 (Tenn.1985), the Tennessee Supreme Court declared that it had earlier misread *Harris v. Oklahoma* to flatly prohibit dual punishment for felony murder and the underlying felony. See *Briggs v. State* (*Briggs II*), 573 S.W.2d 157 (Tenn.1978). The court now recognized that *Harris* was confined to instances in which a defendant had been subjected to successive prosecutions, and that the Federal Constitution allowed cumulative punishment based on convictions at a single trial (if that is what the state legislature intended). *Blackburn*, 694 S.W.2d at 936.

Addressing the issue of whether a defendant could be separately convicted and punished for assault with intent to commit rape and a resulting felony murder, the Tennessee court stated that

> neither reason nor authority [supports the rule] that one who commits murder during the perpetration of a felony named [in the felony-murder statute] cannot or should not be convicted and punished for both the offense of murder ... and for the named felony. Nothing in the statutory definitions of [felony] murder ... and of the felonies listed in [the felony-murder statute] indicates a legislative intent that conviction and punishment for both offenses should not be permitted.

Blackburn, 694 S.W.2d at 936-37 (quoting *State v. Briggs* (*Briggs I*), 533 S.W.2d 290, 292-93 (Tenn.1976)). Noting that the underlying felony statutes and the murder statute "are directed to separate evils", the court concluded that the Tennessee legislature "intended that multiple punishments be imposed on conviction of a defendant for felony murder and the underlying felony." Id. at 937.

The Virginia Supreme Court reached the same conclusion in *Fitzgerald v. Commonwealth,* 223 Va. 615, 292 S.E.2d 798 (1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1235, 75 L.Ed.2d 469 (1983). The defendant had been convicted of rape, robbery, and a resulting felony murder. The Virginia court recognized that *Harris* and *Brown* dealt with the prohibition against successive prosecutions, and that, when a defendant is convicted of both felony murder and an underlying felony at a single trial, the constitutionality of multiple punishment hinges on the intent of the state legislature. *Fitzgerald,* 292 S.E.2d at 809. The court then examined the legislative history of Virginia's felony-murder statute. The court concluded that the Virginia legislature had enacted the felony-murder statute as part of its efforts to re-classify the various types of murder, so that the penalty for each type might more justly reflect its level of culpability. This legislative history, said the court, reflected the legislature's intention to allow cumulative punishment for both the murder and the underlying felony:

> The overriding purpose of the murder statutes being gradation, we can divine no legislative intent to eliminate punishment for other offenses included in the murder statutes

> solely for the purpose of categorizing the murder. The legislature has granted authority for the punishment of rape ... and robbery[.] Moreover, ... the General Assembly has provided, "When any person is convicted of two or more offenses, and sentenced to confinement, such sentences shall not run concurrently, unless expressly ordered by the court." In the face of the current statutory scheme and its legislative history, we can not say that the legislature intended any elimination of [the] underlying sentencing authority for rape and robbery when it modified the murder statutes in 1975, or on any prior occasion.

Fitzgerald, 292 S.E.2d at 810 (citations omitted). Moreover, the Virginia court continued, "[a] contrary conclusion would create disorder and anomalous results in punishments" because a defendant convicted of robbery and non-felony second-degree murder (e.g., murder committed knowingly or by an act of extreme recklessness) might well receive a greater sentence of imprisonment than a co-defendant who was convicted of robbery and felony murder (which in

Virginia is first-degree murder) arising from the same transaction. Id. at 811. For these reasons, the Virginia court concluded, the defendant's separate convictions and punishments for rape, robbery, and felony murder did not violate the double jeopardy clause. Id.

In *State v. Greco,* 216 Conn. 282, 579 A.2d 84 (1990), the Connecticut Supreme Court concluded that its legislature intended separate punishments for felony murder and an underlying felony. The court noted that the legislature had set forth separate punishments in separate statutes for murder and the various predicate felonies, rather than making the penalty for felony murder a multiple or other direct enhancement of the penalties for the underlying felonies. Id. The court also noted that the Connecticut legislature had enacted several statutes that limited a defendant's punishment for specified multiple offenses potentially committed in the same transaction: "Since the legislature has shown that it knows how to bar multiple punishments expressly when it does not intend such punishment, the absence of similar language in [the felony-murder statute] provides evidence that the legislature intended cumulative punishment." Id. The court then commented upon "the distinct nature of the interests protected

by the felony murder, robbery, and burglary statutes":

> An obvious purpose of the felony murder statute, or any murder statute, is to protect human life.... In contrast, the basic rationale [of the robbery statutes] is protection against the terror of forcible taking ..., while the primary rationale of the crime of burglary is protection against invasion of premises likely to terrorize occupants[.] Each of these three statutes penalizes a different type of evil. Since the felony murder statute and the underlying felony statutes are designed to address separate evils, they provide clear evidence that the legislature intended multiple punishments.

Greco, 579 A.2d at 91 (citations omitted). Finally, the Connecticut court interpreted the felony-murder statute as representing another method of committing murder, rather than representing an increased penalty provision for the underlying felonies. Id. The court concluded, "[o]n the basis ... of the language, structure, and legislative history of [the felony-murder statute], ... that the legislature clearly intended

multiple punishments for felony murder and the underlying predicate offenses of robbery and burglary." Id.

Accord: *State v. McCovey,* 803 P.2d 1234 (Utah 1990); *State v. Gonzales,* 245 Kan. 691, 783 P.2d 1239, 1246-49 (1989) (noting the "absurdity" of allowing two criminal convictions if the injured victim lives but allowing only one conviction if the victim dies); *People v. Williams,* 195 Cal.App.3d 398, 240 Cal.Rptr. 717, 719-723 (1987), cert. denied, 488 U.S. 832, 109 S.Ct. 89, 102 L.Ed.2d 65 (1988); *Talancon v. State,* 102 Nev. 294, 721 P.2d 764 (1986) (legislative intent to allow cumulative punishment inferred from the fact that the felony-murder statute protects distinct interests from the predicate felony statutes, and from the fact that the legislature had, through inaction, apparently acquiesced in the Nevada court's earlier decision allowing cumulative punishment); *State v. Enmund,* 476 So.2d 165 (Fla.1985); *State v. Close,* 191 Mont. 229, 623 P.2d 940, 949-51 (1981).

Not all the state decisions support multiple punishment. In *Cook v. State,* 841 P.2d 1345 (Wyo.1992), the Wyoming court recognized that the question was one of legislative intent, but the court concluded that the Wyoming

legislature had intended only one punishment for felony murder and the underlying felony. The Wyoming court interpreted felony murder to be, in essence, the most aggravated form of robbery. The court stated, "[a]s the threat of or use of violence against the person increases, the severity of legislatively authorized punishment increases." Id. at 1352. The court also relied on the fact that, under Wyoming law, the punishment for murder is either death or life in prison without possibility of parole--sentences that apparently obviate the need for any additional punishment. Id. at 1353.

The Alaska Supreme Court's Decision in *Tuckfield*

As discussed above, Todd relies on the Alaska Supreme Court's decision in *Tuckfield* for the proposition that the double jeopardy clause is invariably violated when a defendant is "convict[ed] of both an offense and a lesser included offense, unless the convictions arise from separate conduct." *Tuckfield,* 21 P.2d at 1352. As can be seen from the preceding discussion of federal double jeopardy law, this statement from *Tuckfield* is erroneous. Under the Federal Constitution, defendants who are tried on several charges at a single trial can be separately convicted and punished for both a greater offense and a lesser included offense if the

legislature has authorized this cumulative punishment.

Moreover, the statement from *Tuckfield* is directly at odds with the Alaska Supreme Court's decision in *Jacinth v. State,* 593 P.2d 263 (Alaska 1979), a case decided less than two years before. The defendant in *Jacinth* had burned down an "adult" theater, unintentionally causing the death of a man who lived on the premises. *Jacinth* was convicted of both second-degree arson and manslaughter under the former criminal code. Id. at 264. He argued that the double jeopardy clause prohibited his receiving separate convictions for a single criminal act. The supreme court rejected this argument, holding that arson and manslaughter were sufficiently distinct (both in terms of the conduct and intent they involved and in terms of the societal interests they protected) to support separate convictions and sentences under *Whitton. Jacinth,* 593 P.2d at 266-67.

Under the facts in *Jacinth,* and using the "cognate" approach to lesser included offenses adopted by the Alaska Supreme Court in Elisovsky, Jacinth's crimes of manslaughter and arson stood in the relation of greater offense and lesser included offense. Under Alaska's former criminal code (the law governing Jacinth's case), an

unintentional homicide committed in the perpetration of a felony was manslaughter. The supreme court clarified this "felony-manslaughter" rule in *Keith v. State,* 612 P.2d 977 (Alaska 1980):

> In *Gray v. State,* 463 P.2d 897, 906 (Alaska 1970), we held that a killing done in the perpetration of a felony, but without a specific intent or purpose to kill, constitutes manslaughter. This is, in a sense, a felony-manslaughter rule and appears to be a rather distinctive homicide scheme.

Keith, 612 P.2d at 987-88.[9]

Jacinth's act of willfully setting the building on fire (arson) was the unlawful act that caused the unintended homicide, thus establishing the crime of manslaughter under Alaska's former "felony-manslaughter" rule. Nevertheless, despite this relationship between the manslaughter and the arson, the supreme court upheld Jacinth's separate convictions

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[9] Keith went on to hold that an unintended killing committed during the perpetration of any crime, whether felony or misdemeanor, was manslaughter under Alaska's former criminal code. Id. at 988-89.

(and consecutive sentences) for these two crimes.

The *Tuckfield* opinion does not mention *Jacinth*, and the supreme court has not had later occasion to discuss the relationship of these two cases. However, if we are to reconcile these two decisions, *Tuckfield* can not be read as broadly as Todd wishes.

The precise holding in *Tuckfield* is that a defendant can not be separately convicted for both an assault with intent to commit rape and the completed rape arising from the same assault. Examined under the criteria announced in *Whitton*, this holding is all but self-evident and is completely consistent with the supreme court's decision in *Jacinth* that separate convictions are permitted for arson and manslaughter. Looking at the facts of *Tuckfield,* the result in that case appears to be a straightforward application of the rule now codified in AS 11.31.140(c), that "[a] person may not be convicted on the basis of the same course of conduct of both [an attempt and] the crime that is the object of the attempt".

It is *Tuckfield*'s broader language--the statement that separate convictions are never permitted for a greater and a

lesser included offense--that creates the tension with *Jacinth*.

Tuckfield cites two cases for the proposition that a greater and a lesser included offense can never support two convictions. The first, *In re Dennis B.*, 18 Cal.3d 687, 135 Cal.Rptr. 82, 85, 557 P.2d 514, 517 (1976), is miscited. In the cited passage from *Dennis B.*, the California Supreme Court speaks of the rule that the double jeopardy clause bars successive prosecutions for a greater and a lesser offense. Compare *Harris v. Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), discussed in footnote 7. The second case cited by the supreme court, *People v. Brown,* 185 Colo. 272, 523 P.2d 986, 988 (1974), holds that a defendant can not be convicted of both possession of narcotics for sale and simple possession of narcotics when both charges arise from a single act of possession--again, a readily apparent result under a *Whitton* analysis, and a holding that does not speak to the kind of situation presented in *Jacinth*, where the two crimes (arson and manslaughter) involve substantial differences in intent and conduct and address significantly different societal interests.

After the United States Supreme Court's decision in *Missouri v. Hunter*, it is clear that *Tuckfield*'s broader

implications are wrong. There is no universal rule barring separate convictions and sentences for a greater offense and a lesser included offense, so long as these two convictions arise from a single trial. Even though the elements of one offense may completely subsume the elements of another, so that the two crimes are the "same offense" under the *Blockburger* test, the federal double jeopardy clause allows separate convictions and punishments for both the greater offense and the lesser included offense if this is what the legislature intended.[10]

Tuckfield correctly resolved the situation presented in

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[10] In fact, the Alaska Supreme Court acknowledged this tenet of double jeopardy law in *State v. Dunlop,* 721 P.2d 604, 606 n. 6 (Alaska 1986):

> The United States Supreme Court has repeatedly stated that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiplied cannot be resolved without determining what punishments the Legislative Branch has authorized;" *Whalen v. United States*; *Jeffers v. United States,* 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); *Bell v. United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955). Other jurisdictions concur. See *State v. Miranda,* 3 Ariz.App. 550, 416 P.2d 444, 451 (1966); *State v. Myers,* 171 W.Va. 277, 298 S.E.2d 813, 816 (W.Va.1982); *State v. Rabe,* 96 Wis.2d 48, 291 N.W.2d 809, 819 (1980).

that case--the situation in which the government seeks to convict a defendant, based on a single criminal act, of both an attempt or an assault intended to accomplish a specific crime and, additionally, the completed crime itself. However, *Tuckfield*'s statement that separate convictions are never allowed for greater and lesser included offenses is erroneous. Accordingly, we must re-examine our decision in *Hughes.*

In *Hughes*, this court held that a defendant could not be convicted of both attempted robbery and manslaughter for a homicide that resulted from the robbery attempt. This holding was perceived to be dictated by the supreme court's decision in *Tuckfield.* This court wrote that, because "an underlying felony is a lesser-included offense of a felony homicide[,] ... *Tuckfield* requires us to find that convicting [a defendant] of both [a predicate felony] and [felony] manslaughter violate[s] [the] double jeopardy [clause]". *Hughes,* 668 P.2d at 844-45.

We now perceive that the answer to the multiple punishment issue is not governed by *Tuckfield.* Instead, the answer must be found by investigating the legislature's intent in enacting the robbery and felony-murder statutes, and by examining these two statutes under the criteria established in

Whitton.

> Did the Alaska Legislature Intend to Authorize Cumulative Punishment for Felony Murder and a Predicate Felony?

As pointed out above, Alaska's former criminal code did not follow the common-law felony-murder rule. Instead, under pre-1980 Alaska law, all forms of murder--including felony murder--required proof of an intent to kill. An unintentional homicide occurring during the commission of a felony (or a misdemeanor) was manslaughter. *Keith*, 612 P.2d at 987-88.

The drafters of Alaska's current criminal code wrote the second-degree murder statute, AS 11.41.110(a), to single out certain types of unintentional homicide that would have been manslaughter under prior law, changing the classification of these homicides to murder. In particular, with respect to felony murder, the drafters wrote:

> In considering the Revised Code's approach to the felony murder statute, it must be recalled that the purpose of a felony murder rule is to deter all killings during the

> commission of felonies which involve a high potential for violence. By holding the felon liable for an unintended and even [an] accidental death occurring in the course of or in furtherance of a felony, the rule provides a powerful incentive not to commit inherently dangerous crimes, or at the very least to plan and carry out such crimes with increased regard for physical dangers.
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> For all practical purposes, Alaska does not now [i.e., in 1977] have a felony murder rule. In *Gray*, ... the Supreme Court held that an "intent to kill" is a necessary element of felony murder under existing law. Consequently, an accidental killing occurring during the commission of an enumerated felony does not render the actor guilty of felony murder under the existing statute.

Subsection (a)(3) specifically eliminates the *Gray* requirement that a felon "purposely" kill during the commission of an enumerated felony. In doing so, the Revised Code brings Alaska's felony murder rule into

conformance with the rule in 48 states.

Existing Alaska law lists the crimes of rape, arson, robbery and burglary as felonies sufficient to trigger the application of the felony murder rule. The [proposed] felony murder provision in subsection (a)(3) of the Revised Code only lists those degrees or forms of arson, burglary and sexual assault which create a serious risk of violence. Because all degrees of robbery involve the use or threatened use of physical force, the commission of any degree of robbery is sufficient to bring into play the felony murder rule.

Alaska Criminal Code Revision, Tentative Draft, Part 1, pp. 27-29.

The drafters' commentary to AS 11.41.110(a)(3) demonstrates that the intent of AS 11.41.110(a)(3) was to change the degree of homicide in situations like the one presented in *Jacinth*. Under the revised code, if a defendant commits or tries to commit one of the listed predicate felonies and an unintentional death results, the homicide is classified as murder, not just manslaughter, and the penalty is concomitantly more severe.

The drafters' commentary illustrates another important point. Under Alaska law, felony murder is not an aggravated form of robbery, arson, sexual assault, or any of the other enumerated predicate felonies. Rather, felony murder was intended to be an aggravated form of manslaughter. Under the statute, the defendant's intent to commit one of the listed felonies constitutes the culpable mental state that makes any resulting homicide murder, even if the homicide was unintended. In essence, the defendant's intent to commit one of the listed dangerous felonies constitutes a heightened form of recklessness that raises the classification of a resulting homicide from manslaughter to murder. See *State v. Enmund*, 476 So.2d 165, 168-69 (Fla.1985) (Shaw, J., concurring). This is analogous to the common-law felony-murder rule, under which the defendant's intent to engage in a dangerous felony constituted the malice required for murder. R. Perkins & R. Boyce, Criminal Law (3rd ed. 1982), p. 71.[11]

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[11] Compare the analysis of Chief Judge Bazelon in *United States v. Greene*, 489 F.2d 1145 (D.C.Cir.1973), cert. denied, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 190 (1974):

> At common law, homicides were divided into two categories, murder and manslaughter, with murder requiring a showing of "malice." Any homicide committed in the course of a felony was considered murder because malice

Alaska law most clearly calls for separate convictions and punishments when the victim of the homicide is someone

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could be implied from the commission of the felony. When homicides were further subdivided by statute into first degree murder, second degree murder[,] and manslaughter, the doctrine of felony murder was preserved, and the underlying felony was viewed as providing the "premeditation" and "deliberation" otherwise required for first degree murder, as well as malice, where necessary.

Given this rationale for the felony murder doctrine, it strains credulity to hold that the underlying felony merges with the felony murder. The statute proscribing the underlying felony--robbery, for example--is designed to protect a wholly different societal interest from the felony murder statute, which is intended to protect against homicide. The underlying felony is an essential element of felony murder only because without it the homicide might be second degree murder or manslaughter.

Greene, 489 F.2d at 1168-69.

Judge Bazelon's analysis is in accord with the view taken by the Alaska Supreme Court in *Padie v. State*, 557 P.2d 1138 (Alaska 1976). Referring to the three degrees of criminal homicide under Alaska's former criminal code--first-degree murder (which included felony murder), second-degree murder, and manslaughter--the court stated, "All three of these offenses require the same physical act, the unlawful killing of a human being. The difference is in the mental state of the perpetrator." *Padie*, 557 P.2d at 1141 (emphasis added).

other than the victim of the underlying felony--as when a bystander or a police officer is killed during a robbery. Under such circumstances, Alaska precedent clearly supports separate convictions and punishments for the felony and the homicide. See *State v. Dunlop,* 721 P.2d 604 (Alaska 1986) (a defendant who kills or injures two or more people by a single reckless act commits a separately punishable homicide or assault upon each victim); *Cooper v. State,* 595 P.2d 648 (Alaska 1979) (a defendant who threatens or terrorizes two or more people by a single assaultive act commits a separately punishable assault upon each victim). But even when the defendant's crimes involve only one victim, we conclude that the Alaska legislature intended to authorize separate convictions and punishments for the underlying felony and the resulting homicide.

Nothing in the legislative history of Alaska's felony-murder statute, and nothing in any subsequent legislation, indicates legislative dissatisfaction with the result in *Jacinth*--the Alaska Supreme Court's decision that a single criminal act (arson) will support separate convictions and punishments for both the felony and a resulting homicide. In fact, the legislative history of the felony-murder statute affirmatively indicates that the legislature intended for the

defendant to receive separate convictions. This legislative intent is manifested by AS 11.41.115(c) and the legislature's commentary to that section.

AS 11.41.115(c) provides a limited exception to the felony-murder rule codified in AS 11.41.110(a)(3). The statute reads:

> (c) A person may not be convicted of murder in the second degree under AS 11.41.110(a)(3) [the felony-murder statute] if the only underlying crime is burglary, the sole purpose of the burglary is a criminal homicide, and the person killed is the intended victim of the defendant. However, if the defendant causes the death of any other person, the defendant may be convicted of murder in the second degree under AS 11.41.110(a)(3). Nothing in this subsection precludes a prosecution for or conviction of murder in the first degree or murder in the second degree under AS 11.41.110(a)(1) or (2) or of any other crime, including manslaughter or bu-glary.

The commentary to this statute states that it was intended to work a "merger" of the homicide and the underlying burglary:

> Subsection (c) was referred to at Criminal Law Subcommission meetings as the "felony-murder merger doctrine." In considering this extremely limited exemption from the felony-murder rule, it must be recalled that the purpose of the rule is to diminish the risk of unintentional or even accidental killings during the commission of violent felonies. One of these felonies, burglary in the first degree, occurs when a person enters a dwelling with intent to commit a crime. If a person commits burglary in the first degree by breaking into a house with intent to kill the occupant, the felony-murder rule would have no deterrent effect. Permitting a conviction for murder under the felony-murder rule in this circumstance would also have the effect of preventing the jury from considering whether the defendant acted in the "heat of passion."

> The Code does not permit a conviction for felony-murder in this situation; the felony is said to "merge" with the homicide. Of course, the defendant can still be charged with first or second degree murder for the intentional killing. The effect of the felony-murder merger doctrine is to prohibit a second-degree murder conviction solely on proof that the defendant committed first degree burglary by entering a dwelling with intent to kill the occupant.

1978 Senate Journal 1399, Supp. No. 47 (June 12), p. 12. See also the Criminal Code Revision Subcommission's commentary to the originally proposed version of this statute, TD 11.41.110(d), found in the Alaska Criminal Code Revision, Tentative Draft, Part 1, pp. 32-33.

From this legislative commentary, two things are apparent. First, even in the situation described in the statute (a burglary committed for the purpose of killing someone) when the felony-murder rule does not apply, the legislature still envisioned that the defendant might be separately convicted of murder (first-degree murder) or manslaughter

and, additionally, the underlying burglary. See *Mead v. State*, 489 P.2d 738, 742-43 (Alaska 1971) (allowing separate convictions for burglary and the motivating theft). Second, because the legislature enacted a special provision to merge the two potential offenses in this specific situation, the legislature must have intended that defendants in other felony-murder situations would be subject to conviction and punishment for both the homicide and the underlying felony.

We note that the Alaska legislature has, in other sections of the criminal code, expressly prohibited multiple punishment for potentially separate crimes. See AS 11.31.140(b) (prohibiting more than one punishment for attempt when two or more attempts are made to commit the same crime), and AS 11.31.140(c) (prohibiting conviction for both attempt/solicitation and the completed crime). Given the legislature's demonstrated willingness to enact statutes that limit the number of convictions under particular circumstances, the legislature's failure to require a general merger of convictions for felony murder and the predicate felonies is further evidence of a legislative intent to allow multiple convictions.

Robbery and felony murder are directed to distinct

societal interests. As the legislative commentary points out, felony murder is a grade of homicide, a crime whose primary rationale is the protection and vindication of human life. Robbery, on the other hand, punishes assaultive conduct whose aim is the taking of property. The rationale of robbery is the protection of people against "the terror of forcible taking [of property]". *State v. Greco,* 216 Conn. 282, 579 A.2d 84, 91 (1990).

It is true that the Alaska legislature now classifies robbery among the "offenses against the person" in chapter 41 of the criminal code, accentuating its assaultive aspect. Nevertheless, the theft aspect of robbery can not be ignored. Both the common law and Alaska's criminal law (both the former criminal code and the current one) have always treated the crime of robbery as more serious than the sum of its parts. Among assaults, those assaults motivated by theft have always been viewed as among the most serious, and the resulting crime of robbery has always been punished more severely than either assault or theft, or even the combination of both. For instance, under Alaska law, a person who menaces another person with a dangerous weapon commits third-degree assault, a class C felony. AS 11.41.220(a)(1) and (b). A person who attempts to take property from

another commits no more than a class C felony. (If the property is worth less than $25,000, the attempted theft is a misdemeanor.) AS 11.46.120-150 and AS 11.31.100(d). Yet an armed assault motivated by an intent to take property is first-degree robbery, a class A felony, even if the attempted taking is unsuccessful. AS 11.41.500(a).[12]

For all these reasons, we conclude that the Alaska legislature intended to authorize separate convictions and cumulative punishment for felony murder and a predicate felony.

Are Cumulative Punishments Consistent with the Alaska Constitution as Interpreted in *Whitton*?

Under *Missouri v. Hunter,* our determination of the Alaska legislature's intent to authorize cumulative punishments concludes our double jeopardy inquiry under the Federal Constitution. For state constitutional purposes, however, we must decide whether the legislature's intention

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[12] Alaska's former criminal code also provided a significantly greater punishment for armed robbery than the punishments for theft and assault with a dangerous weapon. *Whitton,* 479 P.2d at 304-05.

is consistent with *Whitton v. State*.

Whitton directs us to consider "the basic interests of society to be vindicated or protected" by the two statutes. *Whitton v. State*, 479 P.2d at 312. As we have already discussed in more detail, the crimes of robbery and felony murder address distinct evils. The robbery statute is aimed at protecting people from being terrorized by an assault whose aim is the taking of property. Felony murder, on the other hand, is an aggravated form of manslaughter, a statute addressed to the protection and vindication of human life. As the drafters of the revised criminal code wrote, if the increased punishment for an unintended homicide does not deter people from committing dangerous felonies, it will at least encourage criminals "to plan and carry out such crimes with increased regard for physical dangers". Tentative Draft, Part 1, p. 28.

Whitton further directs us to consider "the broad objectives of [the] criminal law[,] such as punishment of the criminal for his crime, rehabilitation of the criminal, and prevention of future crimes". Id. at 312. The purpose of the felony-murder statute is to deter people from committing the listed dangerous felonies or, failing that, to encourage felons

to be extremely careful when committing these felonies. The increased deterrence provided by the potential additional charge of felony murder implements one of the major purposes of the criminal law. See *State v. Dunlop,* 721 P.2d at 610.

Finally, we look to the legal precedent provided by *Jacinth v. State.* In *Jacinth,* the supreme court resolved an analogous question: whether *Whitton* allows separate punishments for arson and manslaughter arising from the same act. Although Alaska's criminal code now declares that an unintended homicide arising from a dangerous felony is murder, not manslaughter, this change in the law does not appear to alter *Jacinth*'s analysis of the *Whitton* issue.

We therefore hold that the Alaska Constitution allows separate convictions and punishments for felony murder and the underlying felony, even though, under Alaska's cognate approach, the underlying felony may be a lesser included offense of felony murder. We overrule *Hughes v. State* to the extent that it contradicts our holding in this case.

The judgement of the superior court is AFFIRMED.

UNITED STATES CONSTITUTION

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALASKA STATUTES

Alaska Statutes, Section 11.41.110:

Murder in the second degree

(a) A person commits the crime of murder in the second degree if

(1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person;

(2) the person knowingly engages in conduct that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life; or

(3) acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree, sexual assault in the second degree, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from that crime, any person causes the death

of a person other than one of the participants.

(b) Murder in the second degree is an unclassified felony and is punishable as provided in AS 12.55.

Alaska Statutes, Section 11.41.500:

Robbery in the first degree

(a) A person commits the crime of robbery in the first degree if the person violates AS 11.41.510 and, in the course of violating that section or in immediate flight thereafter, that person or another participant

(1) is armed with a deadly weapon or represents by words or other conduct that either that person or another participant is so armed;

(2) uses or attempts to use a dangerous instrument or a defensive weapon or represents by words or other conduct that either that person or another participant is armed with a dangerous instrument or a defensive weapon; or

(3) causes or attempts to cause serious physical injury to any person.

(b) Robbery in the first degree is a class A felony.

Alaska Statutes, Section 11.41.510:

Robbery in the second degree

(a) A person commits the crime of robbery in the second degree if, in the course of taking or attempting to take property from the immediate presence and control of another, the person uses or threatens the immediate use of force upon any person with intent to

(1) prevent or overcome resistance to the taking of the property or the retention of the property after taking; or

(2) compel any person to deliver the property or engage in other conduct which might aid in the taking of the property.

(b) Robbery in the second degree is a class B felony.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JOSEPH HARVEY and	)
ROBYN A. TODD,	)
	)
Defendants.	)
	)

Nos. 3AN-S91-8148 Cr.
3AN-S91-8149 Cr.

VOLUME II

TRANSCRIPT OF PROCEEDINGS

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SENTENCING HEARING, CONTINUED

BEFORE THE HONORABLE RENE GONZALEZ

Superior Court Judge

Anchorage, Alaska

August 3, 1992

8:40 o'clock a.m.

APPEARANCES:

FOR THE PLAINTIFF:
SHANNON HANLEY
Assistant District Attorney
1031 West Fourth Avenue
Suite 520
Anchorage, Alaska

FOR DEFENDANT HARVEY:
MITCHEL SCHAPIRA
Assistant Public Advocate
900 West Fifth Avenue
Suite 525
Anchorage, Alaska

FOR DEFENDANT TODD:
BLAIR McCUNE
DAVID WEBER
Assistant Public Defenders
900 W. 5th Ave., Suite 200
Anchorage, Alaska

(EXCERPT)

THE COURT: Thank you. The issue that's presented is not one of easy resolution. We've done substantial research in the area and find that there isn't a case from the court of appeals or the court -- or the Alaska Supreme Court

that's clearly on point. There is a lot of case law with some very general propositions and constitutional law statements. But we have considered the cases cited. Both Mr. Harvey and Mr. Todd were convicted by a jury of robbery in the first degree and second degree felony murder, as well as assault in the third degree. The analysis that I will give references primarily robbery in the first degree and the second degree felony murder, but the same analysis applies equally to the assault in the third degree. Each offense is defined by separate statutory provision, but the elements of each offense differ in only one important respect. That is particularly the robbery in the first degree and the felony murder in the second degree. Second degree felony murder requires proof of all the elements of robbery plus proof of the additional element that in the course of, or in furtherance of that crime, or in immediate flight from that crime any person causes the death of a person other than one of the participants. Both defendants argue that despite their convictions of both for these two offenses, for robbery in the first degree and second degree felony murder, that this court should not and cannot constitutionally impose separate sentences or consecutive sentences without violating the double jeopardy clauses of the Alaska Constitution, and the double jeopardy clause of the

federal constitution. The starting point of the court's analysis is Whitton versus State that is found at 479 P.2d 302 (Alaska 1970). The supreme court in Whitton stated the following. Quote, in determining whether several statutory violations constitute the same offense for double jeopardy purposes, we focus upon the quality of the differences, if any exist, between the separate statutory offenses if such differences relate to the basic interest sought to be vindicated or protected by the statutes. A trial judge first will compare the different statutes in question as they apply to the facts of the case to determine whether there were involved differences in intent or conduct. He would then judge any such differences he found in light of the basic interest of society to be vindicated or protected and decide whether those differences were substantial or significant enough to warrant multiple punishments. The social interest to be considered would include the nature of personal property or other rights sought to be protected and the broad objectives of criminal law such as punishment of the criminal for his crime, rehabilitation of the criminal, and the prevention of future crimes. If such differences in intent or conduct are significant or substantial in relation to the social interest involved, multiple sentences may be imposed, and the constitutional prohibition against

double jeopardy will not be violated. End of quote. Thus, under Whitton it's clear that this court must consider not only the elements of the statutes, but also the actual conduct that they proscribe and the social policies they seek to uphold. Here the defendants correctly note that the commission of robbery in the first degree was a necessary element of the conviction for felony murder. Going to the similarity, the defendants have cited Hughes versus State found at 668 P.2d 842, Alaska Appellate 1983. As authority for the proposition that double jeopardy prohibits punishment for both a greater and lesser included offense, including felony murder in the underlying felony. Although Hughes does suggest that on the facts of that case double jeopardy would bar punishment for both attempted robbery and manslaughter, Hughes relied on Tuckfield (ph) versus State found at 621 P.2d 1350, Alaska 1981. In Tuckfield (ph) the supreme court cited the double jeopardy is violated by conviction of both an offense and lesser included offense unless the convictions arise from separate conduct. The court specifically recognized that this rule is related to, but distinguishable from, the question considered in Whitton and subsequent cases concerning whether separate punishment may be imposed for separate statutory offenses arising out of the same conduct. Thus

despite the similarity -- despite the similar elements of first degree robbery and felony murder, Tuckfield (ph) recognizes that the analysis set forth in Whitton must be completed to determine whether multiple sentences in this case run afoul of the double jeopardy clause. In this case there exists a plain difference in the conduct prohibited by robbery and felony murder. The first degree robbery statute prohibits depriving a person of his property or being armed with a deadly weapon or dangerous instrument. The felony murder statute prohibits the plainly distinct act of actually killing a person while depriving him of his property. This distinction is by no means insignificant and underscores the difference social interests furthered by the different statutes. The prohibition against depriving a person of his property protects against the invasion of personal privacy and property, while the prohibition against felony murder aims at preserving the sanctity of human life. Moreover it appears unarguable that the legislature intended separate penalties to be permissible for these two offenses. Thereby effectuating the broad objectives of criminal law. This court concludes that the differences in intent, conduct and social policy are sufficient to permit the imposition of separate penalties for first degree robbery and felony murder.

IN THE SUPREME COURT OF THE STATE OF ALASKA

ROBYN A. TODD,	)	
	)	Supreme Court No. S-6709
Petitioner,	)	
	)	ORDER
v.	)	
	)	
STATE OF ALASKA,	)	
	)	
Respondent.	)	
	)	

Court of Appeals No. A-4618
Superior Court No. 3AN-S91-8149 Cr.

Before: MOORE, CHIEF JUSTICE, RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

On consideration of the petition for hearing, filed on November 13, 1994, and the response to the petition filed on December 1, 1994,

IT IS ORDERED:

1. The petition for hearing is GRANTED.

2. Under Appellate Rule 305(a), formal briefs conforming to Appellate Rule 212 shall be filed in the Supreme Court. The petitioner's opening brief shall be

served and filed on or before February 8, 1995. Briefing shall thereafter proceed on the schedule prescribed in Appellate Rule 212(a)(1).

3. Either party may request oral argument within the time allowed by Appellate Rule 213(a).

Entered by direction of the Supreme Court at Anchorage, Alaska on January 9, 1995.

CLERK OF THE SUPREME COURT

/s/Jan Hansen

JAN HANSEN